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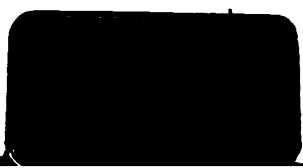
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JSN
JAN
IAM

v.3

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Queen's Bench,

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

HILARY, EASTER AND TRINITY TERMS, 1838.

BY

SANDFORD NEVILLE, ESQ.

AND

THOMAS ERSKINE PERRY, ESQ.

OF THE INNER TEMPLE, BARRISTERS AT LAW.

VOL. III.

WITH

AN INDEX OF THE PRINCIPAL MATTERS.

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J U D G E S
OF THE
COURT OF QUEEN'S BENCH,

During the Period of these Reports.

The Right Hon. THOMAS LORD DENMAN, C. J.

The Hon. Sir JOSEPH LITLEDALE, Knt.

The Hon. Sir JOHN PATTESON, Knt.

The Hon. Sir JOHN WILLIAMS, Knt.

The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.



A

T A B L E

OF

THE CASES REPORTED

IN THE THIRD VOLUME.

	<i>Page</i>		<i>Page</i>
A.			
ABBOTT, Gillett v. . . .	24	Binns v. Towsey	88
Abbott, and others, Rout-		Blunt and another v. Har-	
ledge v.	560	wood	577
Abercrombie v. Hickman .	676	— v. Heslop	553
Abergele, Inhabitants of,		Boards, Ross v.	382
Queen v.	406	Bowles and others, Doe d.	
Adderley, Doe d. Boulton v.	629	Bachelor v.	632
Angell, Banks v.	94	Bragg, Doe d. Mercer v. .	644
Appleyard, Bailey v. . . .	257	Brisco v. Lomax and another	308
Archdall Dr., Queen v. . .	696	Brixham, Inhab. of, Queen v.	408
Ashby v. Minnett and others	231	Burgess, Queen v.	366
Askew, James v.	495	C.	
B.		Cambridge Gas Light Co.,	
Bailey v. Appleyard . . .	257	Queen v.	262
Baker, Webb v.	87	Carmarthen, Recorder of,	
Baldwin, Queen v.	342	Queen v.	19
Balley v. De Arroyave . .	114	Carruthers v. Hollis and anor.	246
Banks v. Angell	94	Cattin v. Simpson	248
Barmston, Inhab. of, Queen v.	167	Church v. Imperial Gas Light	
Barraclough v. Johnson and		Company	35
others	233	Clark, Doe d. Stillwell v.	701
Bayley v. Potts	365	Clements and anor., Knight v.	375
Bedwardine, St. John's in,		Codrington v. Lloyd . . .	442
Inhabitants of, Queen v.	302	Combe, Tisdell v.	29
Bicknell and another v. Green		Constable, Tufnell v. . . .	47
and others	634	Corbett v. Swinburne . . .	551

TABLE OF CASES REPORTED.

	<i>Page</i>		<i>Page</i>
D.		Goodman, Raphael and another v.	
Davies and another, Evans v.	464	Gore v. Wright	243
—, Thomas v.	567	Green and others v. Bicknell	634
Day and others, Sewercrop v.	670	— v. Salmon	388
De Arroyave, Balley v.	114	Griffith, Pugh v.	187
Dening, Taylor v.	228		
Derbyshire, Justices of,		H.	
Queen v.	591	Hack, Kington v.	3
Doe d. Bachelor v. Bowles .	632	Hall v. Maule and others .	459
— d. Boulton v. Adderley	629	Hallen and another, Morgan v.	498
— d. Bridger v. Whitehead	557	Hardwicke Earl of, and another, Newman v.	368
— d. Broughton v. Story	106	Harvey, Ex parte	159
— d. Cadogan v. Ewart .	197	Harwood, Blunt and another v.	577
— d. Madkins v. Horner and another	344	Hayworth, Meyer v.	462
— d. Merceron v. Bragg .	644	Helmere, Hopkins v.	453
— d. Neale v. Samples .	254	Hemsworth, Wilkins v.	55
— d. Baverstock v. Rolfe.	648	Heslop, Blunt v.	553
— d. Rowlandson v. Wainwright	598	Hickman, Abercrombie v. .	676
— d. Wright v. Smith . .	335	Hill and another v. Sydney .	161
— d. Stillwell v. Clark .	701	Hiorns, Queen v.	148
Dolgelly Union, Guardians of, Queen v.	542	Hollis and another, Carruthers v.	246
E.		Hopkins v. Helmore	453
Empson v. Fairfax and others	385	Horne, Pursell v.	564
Evans v. Davies and another	464	Horner, Doe d. Madkins v. .	344
— v. Taylor	174	Hull, Recorder of, Queen v.	595
Evesham, Mayor &c. of, Queen v.	351	Humphery, Queen v.	681
Ewart, Doe d. Cadogan v. .	197	Hurst v. Orbell	237
F.			
Fairfax, Empson v.	385	I.	
Field and another v. Robins	226	Imperial Gas Light Company, Church v.	35
Fry, Richards v.	67	Insolvent Debtors' Court, The Commissioners of, Queen v.	548
G.		In re —	389
Gale and others, Middleton v.	372		
Gillett v. Abbott	24	J.	
Goddard, Wright and others v.	361	James v. Askew	495
Godolphin Lord, and another, Queen v.	488	Johnson and others, Barraclough and others v.	233
Goodburn, Queen v.	468		

TABLE OF CASES REPORTED.

vii

	Page		Page
K.		N.	
Keable v. Payne	531	Newman v. Earl of Hard-	
Kington v. Hack	3	wicke and another . . .	368
Knight v. Clements and ano-			
ther	375	O.	
		Orbell, Hurst v.	237
L.			
Lambeth, St. Mary, Rector		P.	
&c. of, Queen v. . . .	416	Parnaby and others v. Lan-	
Lancaster Canal Company,		caster Canal Co. . . .	523
Parnaby and others v. . .	523	Payn, Queen v.	165
Lant v. Peace	329	Payne, Keable v.	531
Ledgard, Queen v. . . .	513	Peace, Lant v.	329
Leeds, Mayor and Corpora-		Pepper, Queen v.	155
tion of, Queen v. . . .	145	Phillips, Swan v.	447
Leslie, Thorn v.	305	Poole, Mayor, Aldermen and	
Levy v. Yates	249	Burgesses of, Queen v. .	119
Lincoln, Mayor &c. of,		Poole v. Warren	693
Queen v.	273	Poor Law Commissioners,	
Liverpool, Mayor &c. of,		Holborn Union, Queen	
Queen v.	280	v.	77
Lloyd, Codrington v. . . .	442	Potts, Bayley v.	365
Lomax and another, Brisco v.	308	Prince v. Samo	139
Lyons v. Martin	509	Privy Council, Judicial Com-	
		mittee of the, Queen v. .	15
M.		Pugh v. Griffith	187
M'Dermott, Murley v. . . .	356	Pursell v. Horne	564
Manchester and Leeds Rail-			
way Company, Queen v. .	439		
Martin, Lyons v.	509	R.	
—— and Wife v. The		Ramsay, Routledge v. . . .	319
Queen	472	Ramsden, Moore v.	180
Maule and others, Hall v. .	459	Randelson v. Murray and	
Mawgan in Meneage, Inhabi-		another	239
tants of, Queen v. . . .	502	Raphael and another v. Good-	
Merrick v. Wakley	284	man	547
Messenger, Robinson v. . .	583	Regina v. Abergele, Inhabit-	
Meyer v. Haworth	462	ants of	406
Middleton v. Gale and others	372	—— v. Archdall, Dr. . . .	696
Minnett and others, Ashby v.	231	—— v. Baldwin	342
Moore v. Ramsden	180	—— v. Barmston, Inha-	
Morgan v. Hallen and ano-		bitants of	167
ther	498	—— v. Brixham, Inhabit-	
Murley v. M'Dermott . . .	356	ants of	408
Murray and another, Randel-		—— v. Burgess	366
son v.	239	—— v. ———	627

	<i>Page</i>		<i>Page</i>
Regina v. Cambridge Gas		Regina v. W. L. Roberts	295
Light Co.	262	— v. Ruscoe	428
— v. Carmarthen, Re-		— v. Salisbury, Mar-	
corder of	19	quis of	476
— v. Derbyshire, Jus-		— v. Salop, Justices of	286
tices of	591	— v. St. John's, Bedwar-	
— v. Dolgelly Union,		dine, Inhabitants of	302
Guardians of	542	— v. St. Saviour's,	
— v. Evesham, Mayor		Southwark, War-	
&c. of	351	dens &c. of	126, 354
— v. Lord Godolphin		— v. Stock and another	420
and another	488	— v. Lady H. Sutton	
— v. Goodburn	468	and others	569
— v. Hiorns	148	— v. Thomas	288
— v. Hull, Recorder of	595	— v. Toke, clerk, and	
— v. Humphery	681	another	323
— v. Insolvent Debtors'		— v. Wall Lynn	411
Court, Commission-		— v. Wendron, Inhabit-	
ers of	543	ants of	62
— v. St. Mary, Lambeth,		— v. Worcestershire,	
Rector &c. of	416	Justices of	434
— v. Ledgard	513	— v. Wye, Inhabitants	
— v. Leeds, Mayor and		of	6
Corporation of	145	Regulæ Generales	1, 379
— v. Lincoln, Mayor		Richards v. Fry	67
&c. of	273	Ricketts, Queen v.	151
— v. Liverpool, Mayor		Rishworth, Young v.	585
&c. of	280	Roberts, W. L., Queen v.	295
— v. Manchester and		Roberts, W., Queen v.	592
Leeds Railway Co.	439	Robins, Field and another v.	226
— v. Martin and Wife v.	472	Robinson v. Messenger	583
— v. Mawgan in Me-		Rolfe, Doe d. Baverstock v.	648
neage, Inhabitants		Ross v. Boards	382
of	502	Routledge v. Abbott and	
— v. Payn	165	others	560
— v. Pepper	155	Routledge v. Ramsay	319
— v. Poole, Mayor, Al-		Rule of Court	1
dermen and Bur-		Ruscoe, Queen v.	428
gesses of	119		
— v. Poor Law Com-			
missioners, Holborn			
Union	77		
— v. Privy Council, Ju-			
dicial Committee of			
the	15		
— v. Ricketts	151		
— v. W. Roberts	592		

S.

Salisbury, Marquis of, Queen	
v.	476
Salmon, Green v.	388
Salop, Justices of, Queen v.	286
Samples, Doe d. Neale v.	254
Samo, Prince v.	139

TABLE OF CASES REPORTED.

ix

	Page
St. Mary, Lambeth, Rector &c. of, Queen v. . . .	416
St. John's, Bedwardine, In- habitants of, Queen v. . .	302
St. Saviour's, Southwark, Wardens &c. of, Queen v.	126, 354
Scheer, Whitwill v. . . .	398
Sewercrop v. Day and others	670
Sharp, Slack v.	390
Simpson, Cattin v. . . .	248
Slack v. Sharp	390
Smith, Doe d. Wright v. . .	333
Speer and others, Wilder v.	536
Stock and another, Queen v.	420
Story, Doe d. Broughton v. .	106
Sutton, Lady H., and others, Queen v.	569
Sydney, Hill and another v.	161
Swan v. Phillips	447
Swimburne, Corbett v. . .	551

T.

Taylor v. Dening	228
——, Evans v.	174
Thomas v. Davies	567
——, Queen v.	288
Thorn v. Leslie	305
Tisdell v. Combe	29
Toke, clerk, and another, Queen v.	323

Towsey, Binns v.	88
Tufnell v. Constable . . .	47

W.

Wainwright, Doe d. Rowland- son v.	598
Wakley, Merrick v. . . .	284
Wall Lynn, Queen v. . . .	411
Warren, Poole v.	693
Webb v. Baker	87
Wendron, Inhabitants of, Queen v.	62
Whitehead, Doe d. Bridger v.	557
Whitwill v. Scheer	398
Wilcox and another, Williams v.	606
Wilder v. Speer and others .	536
Wilkins v. Hemsworth . . .	55
Williams v. Wilcox and an- other	606
Worcestershire, Justices of, Queen v.	434
Wright v. Goddard and others	361
Wright, Gore v.	243
Wye, Inhabitants of, Queen v.	6

Y.

Yates, Levy v.	249
Young v. Rishworth	585

ERRATA.

Page 197, line 2 and line 3, for "plaintiff" read "defendant."

Page 444, for "Rex v. Harrison," line 3 from bottom, read "King v. Harrison."

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH,

IN

HILARY TERM,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,
Lord DENMAN C. J. WILLIAMS J.
LITLEDALE J. COLERIDGE J.

1838.

—
In the Bail Court,
PATTESON J.

GENERAL RULE.

Jan. 13, 1838.

IT IS ORDERED, That the 17th article of the rule made in Hilary term, 2 *Will.* 4, for regulating the practice of all the Courts of Queen's Bench, Common Pleas, and Exchequer of Pleas, be from henceforth annulled, and that in all cases special bail may be justified before a judge at chambers, both in term and in vacation.

It is also ordered, that no rule for a special jury shall be granted on behalf of any defendant or plaintiff in replevin, except on an affidavit, either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given; and in the latter case no such rule is to be granted, unless such application is made for it more than six days before that day; provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time.

1838.

 RULES OF
 COURT.

It is further ordered, that henceforth every Rule of Court delivered out in vacation, shall be dated the day of the month and week on which the same is delivered out, but shall be entitled as of the term immediately preceding such vacation.

(Signed)	DENMAN,	J. PARKE,
	N. C. TINDAL,	J. B. BOSANQUET,
	ABINGER,	E. H. ALDERSON,
	J. A. PARK,	J. GURNEY.

Jan. 31, 1838.

IT IS HEREBY ORDERED, That on and after the 4th day of this present Hilary term, all affidavits sworn before a commissioner in the country, or a judge of assize on the circuit, be read in the several Courts of Queen's Bench, Common Pleas, and Exchequer, before any judge of the same, or any of the masters thereof, in like manner as other affidavits, and without obliging the party filing them to obtain copies of the same.

And it is further ordered, that all affidavits read before a judge of any of the said Courts, or before a master of the same, shall be filed with a master of the said Courts, and be alphabetically indexed, such affidavits to be delivered to the said masters, in order to be filed, four times in the year, that is to say, the last day of each term.

(Signed by the fifteen Judges.)

Rule of Court. In the Queen's Bench.

Jan. 31, 1838.

Whereas by the practice of this Court in all actions of ejectment, it is necessary that the plea and consent rule should be filed at the chambers of one of the judges of the same Court.

IT IS HEREBY ORDERED, That from and after the last day of this present term, the said practice be discontinued, and in all such actions the plea, with the consent rule an-

nexed thereto, be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer, as heretofore.

1838.

~
RULES OF
COURT.

(Signed) DENMAN, J. WILLIAMS,
J. LITTLEDALE, J. T. COLERIDGE.
J. PATTESON,

KINGTON v. HACK.

Thursday,
January 11th.

JERVIS, in Hilary term last, had obtained a rule, calling upon the plaintiff to shew cause why the writ de contumace capiendo, issued in this cause against the defendant, should not be set aside.

By the affidavit on which the rule was obtained, it appeared that the plaintiff had libelled the defendant in the Consistory Court of the Bishop of Peterborough, for defamation of character. Sentence was passed against the defendant, during his presence in Court, but he was not admonished to take out of the registry of the Court a schedule of the penance to be performed by him. The defendant was afterwards served with a reclamation enjoined by the surrogate of the Court, to be performed by the defendant, which declared that the defendant should, on some day before the return thereof, repair to the minister's house at Brooke, (to which parish the plaintiff and defendant belonged,) and in the presence of a minister, and also in the presence of the plaintiff, should make this confession. (Here followed a recantation of the defamatory words, ending thus,) "now I do hereby humbly ask her pardon, and do promise to behave myself towards her for the future, in a more Christian-like and charitable manner, and I do believe her life and conversation to be sober, chaste, and honest." The affidavit then set out that there was no minister's house at Brooke, nor any vicarage or other house belong-

Where a writ de contumace capiendo set out the sentence of the Spiritual Court, which, among other matters, directed certain costs to be paid by the defendant, the Court of Queen's Bench refused to quash the writ for an alleged invalidity in the sentence, as to the other matters, that part of it being good which awarded costs against the defendant, who was therefore in contempt for the non-payment of them.

1838.

 KINGTON
 v.
 HACK.

ing to or occupied by him, and concluded with setting out the writ *de contumace*, stating the disobedience of the defendant in not performing the penance above set out, "and also in not paying the sum of 25*l.*, the amount of the costs and expenses made and taxed in this cause, and decreed to be paid to the said plaintiff by the said defendant, on or before the said 20th of August, for the costs and expenses incurred by her in the cause, which was promoted by the said defendant against the plaintiff, for defamation, which is merely ecclesiastical or spiritual."

The affidavit in answer alleged, that the defendant was personally admonished to take out a schedule of the penance enjoined him, and stated that the minister of Brooke was the Rev. *H. Finch*, who was also vicar of Oakham, and that the chapel of Brooke was annexed to the vicarage of Oakham, and that it was well known by the defendant, and all the inhabitants of Brooke, that the minister's house at Brooke is within the clerical boundaries of the vicarage of Oakham.

First point:
 The defendant
 was admon-
 ished.

Channel now shewed cause. The first ground on which this writ is sought to be set aside is, that the defendant was never admonished, but to that an answer is given that he was admonished. *Rex v. Maby (a)* is probably relied upon for this point, but in that case the defendant was sentenced to the *usual penance*, and the Court held, that as the defendant could not know what that consisted of without having the schedule, he was not in contempt for disobeying it. Here, the defendant was in Court when sentence was pro-

Second point:
 Sentence of
 Ecclesiastical
 Court discre-
 tional.

nounced, and the sentence was specific. The second point made is, that the sentence is an excess of jurisdiction, as it requires the defendant to speak to the good character of the plaintiff at the time of sentence, but such a form of sentence has been under the consideration of the Court, and was held good in *Birch v. Brown (b)*. The third point relates to the misdescription of the place where the penance is to

(a) 3 D. & R. 570.

(b) 1 Dowl. P. C. 395.

be performed. [Lord Denman C. J. What power can the Spiritual Court have to direct any act to be done in the house of a third party?] Probably they may have jurisdiction over the house of a minister; but whether that be so or not, the rule cannot be made absolute, for the party is in contempt for non-payment of costs; and although the sentence may be bad in part, it might, if there had been an appeal, have been quashed in part, and affirmed in the other part. The plaintiff has succeeded in the main part of her suit, namely, in clearing her character, she is therefore entitled to costs. There are many cases in which significavit have issued for contempt in non-payment of costs.

1838.

KINGTON
v.
HACK.

Third point:
If part of the
sentence is
good, a writ
de contumace
may issue.

Jervis, contra. The decision in *Birch v. Brown* (a) has gone too far, for it has not distinguished between the two kinds of penance enjoined by the Spiritual Court. The first is *pro salute animæ*, and to that the statute (b) applies; the other is for the redress of the party. In the older editions of 3 *Burn's Ecc. Law*, the form of the former penance is given. It is absurd on the face of it, to require a party to make declarations as to the character of a person at a period after the inquiry has taken place.

Second point.

It is contended, that even if the place where the penance is to be performed is wrongly stated, still that forms an objection only to part of the writ; but if the judgment of the Court is defective, the costs which follow upon that judgment cannot be enforced. The Court cannot ascertain that the costs, or part of them, are not imposed in respect of that very matter in which the judgment is invalid. The Court had no power to impose a fine, as they have in the higher sort of penance.

Third point.

LORD DENMAN C. J.—The first question is, whether the defendant was admonished; upon the whole of the affidavits, I think we must take it that he was, though it

(a) 1 Dowl. P. C. 395.

(b) 53 Geo. 3, c. 127.

1838.

 KINGTON
 v.
 HACK.

might have been stated with more clearness. Then on the other points made, if upon any one of the grounds set out in the *significavit*, the defendant is in contempt, that is an answer to this application. Now the writ states, that the defendant has disobeyed the orders of the Court in not paying the costs taxed in the cause, and decreed to be paid by him. This is a precise and definite order. Therefore, whether another part of the sentence is invalid or not, the costs are well awarded, and in a matter where we must take for granted that the Court had power to award them. The defendant has not paid those costs, and upon that the writ was rightly issued.

LITLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.



Saturday,
 January 13th.

The QUEEN v. The Inhabitants of WYE.

By an order of two justices, confirmed on appeal, *D. S.* and *E.* his wife, with their six children, (named therein,) were removed to the parish of *W.* A subsequent order was obtained for the removal of *W. S.* to the parish of *W.*, who was born during the marriage of *D. S.* and *E.*,

ON appeal against an order for the removal of *William Shrubshall*, otherwise *Shrubsole*, and *Elizabeth* his wife, from the parish of *Doddington*, in the county of *Kent*, to the parish of *Wye*, in the same county; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

David Shrubsole, otherwise *Shrubshall*, whose settlement was in *Wye*, was married to *Elizabeth Fenn*, whose settlement was in *Kennington*, at the parish church of *St. Margaret's, Rochester*, on the 24th day of *May, 1813*. By her he had issue *William*, the pauper, and several other children, all born during the marriage, in the parish of *Wye*, and unmancipated at the date of the first order, but was not named in it:—Held, that though the first order of removal, confirmed on appeal, was conclusive as to all the facts stated in it, it was competent to the parish of *W.*, on appeal against the subsequent order, to shew a new state of facts, by proving that, since the date of the first order of sessions, the marriage between the father and mother of *W. S.* had been dissolved by the Ecclesiastical Court, as void ab initio, so as to defeat his derivative settlement in the appellat parish.

Eastling. *David Shrubsole* continued to reside in Eastling, with his wife and family, from the day of his marriage until the month of March, 1833, and during this period he frequently received relief from the parish of Wye. By an order of two justices, dated June 6th, 1833, he was removed from Eastling to Wye, together with his wife and six children therein named, by the description of *David Shrubsole* and *Elizabeth* his wife, and their six children (naming them). The pauper *William* was not named in the said order, but he was then unemancipated, and had gained no settlement in his own right. At the following Midsummer sessions, which were held on the 2d July, 1833, the churchwardens and overseers of Wye entered and respited an appeal against this order, which, after being again respited at the Michaelmas sessions, was confirmed at the Epiphany sessions, on the 31st December, 1833. Previously to the confirmation of this order, the churchwardens of Wye commenced a suit in the Arches Court of Canterbury, for the purpose of annulling the marriage between *David Shrubsole* and his wife, and on the 1st May, 1834, a sentence of that court (a copy of which accompanies, and is to be taken as part of this case (a),) was pronounced, by which the marriage between *David Shrubsole*, otherwise *Shrubshall*, and *Elizabeth Fenn*, was dissolved, "as having been absolutely null and void from the beginning, to all intents and purposes in law whatsoever." The Court of Quarter Sessions were of opinion, that the order of removal, by which *David Shrubsole* and *Elizabeth* his wife, and their six children, were removed from

1838.

 The QUEEN
 v.
 Inhabitants of
 WYE.

(a) The decree of the Ecclesiastical Court purported to be made in a suit promoted by the churchwarden of the parish of Wye, and *David Shrubsole* and *Elizabeth Shrubsole*, otherwise *Fenn*, spinster, falsely calling herself *Shrubsole*; and after reciting that the said *Fenn* was the daughter of one

Richard Shrubsole, brother of the said *David*, pronounced the marriage to have been incestuous and unlawful, and that the same should be dissolved, as having been absolutely null and void from the beginning, to all intents and purposes. Dated 1 May, 1834.

1838.

The QUEEN
v.
Inhabitants of
WYE.

Eastling to Wye, having been confirmed on appeal, was conclusive of the pauper's derivative settlement in Wye from the said *David*, his father. The question for the opinion of this Court is, whether, in consequence of the dissolution of the marriage between *David Shrubsole* and the said *Elizabeth* (the pauper's father and mother) by the sentence of the Arches Court, pronounced subsequently to the date of the confirmed order, for the removal of "*David Shrubsole and Elizabeth his wife to Wye*," the settlement of the pauper, and consequently that of his wife, is in Eastling, the place of his birth, or in Wye, as a derivative settlement from his father. If this Court shall be of opinion that the settlement of the pauper, upon these facts, is in Eastling, the order of sessions, and the order of removal, are to be quashed, otherwise the order of sessions is to be confirmed.

Starr and *Deedes* in support of the order of sessions(*a*). The terms used in the decree dissolving the marriage will probably be relied upon, viz. that it was void from the beginning, to *all intents and purposes*; but *Wilmot* C. J., laid down distinctly in *Evans v. Harrison* (*b*), that there is no distinction between "void" and "void to all intents and purposes." As the case, then, stands, it appears that the marriage, upon which the first order was pronounced, was a void one; but the order for removing the pauper to Wye, having been confirmed on appeal, is a judgment *in rem*, and therefore conclusive. It is quite immaterial that the marriage, upon which the order proceeded, be afterwards discovered to be void. *Nympsfield v. Woodchester* (*c*), *Rex v. St. Mary, Lambeth* (*d*), *Rex v. Binegar* (*e*), *Rex v. North Featherston* (*f*). [*Coleridge* J. An order of sessions, confirmed on appeal, no doubt is conclusive on

(*a*) Saturday, November 11th,
before Lord Denman C. J., *Patten-
son, Williams, and Coleridge, Js.*

(*b*) *Wilmott's Opinions*, 146.

(*c*) 1 Burr. S. C. 191; 2 Stra. 1172.

(*d*) 6 T. R. 615.

(*e*) 7 East, 377.

(*f*) 1 Sess. Ca. 170.

all who are named or implied in it; but this pauper is not named, and you must shew that he is the son of the person who was removed with his family, so as to connect him with the order.] *Rex v. Catterall*(a) shews that an order of removal of the father confirmed, is conclusive as to the settlement of the son, although the son be not named in the order. [Coleridge J. The onus is upon you to shew that he is the son.] The case states him to be the son, and to be born during the marriage. In *Rex v. St. Botolph's, Bishopsgate*(b), *Ryder C. J.* said, "A legitimate child has a right to its parents' settlement;" and for the purposes of this case, this pauper is legitimate. So in *Rex v. St. Mary, Cardigan*(c), it was held, that the settlement of a person attainted, acquired before the attainder, was communicated to children born afterwards; and in *Rex v. Haddenham*(d) it was held, that a settlement might be gained by a person even after attainder. It is true that in *Rex v. Lubbenham*(e) it was decided that a parish who had granted a certificate, acknowledging a pauper and his wife to be their parishioners, might shew, on an appeal from a third parish, that that marriage was void; but that case proceeded on the doctrine that an estoppel binds only the contracting parties; and *New Windsor v. White Waltham*(f) and *Rex v. Headcorn*(g), shew that the certifying parish could not prove the marriage to be void, on an appeal from the parish to which the certificate was granted. By the 99th canon the marriage in question was null and void; the parish of Wye was cognizant of that fact, and the appellants might have applied to dissolve the marriage at an earlier period, or they might have respited the appeal from sessions to sessions, until a decree was pronounced. As it is, after the sessions confirmed the order of removal, they procured a decree dissolving the marriage, and bas-

1838.

 The QUEEN
 v.
 Inhabitants of
 WYE.

(a) 6 M. & S. 83.

(b) Burr. S. C. 367.

(c) 6 T. R. 116.

(d) 15 East, 468.

(e) 4 T. R. 251.

(f) 1 Str. 186.

(g) Burr. S. C. 253.

1838.


The QUEEN
v.
Inhabitants of
WYK.


tardizing a whole family. The case therefore comes within all the decisions above cited, which shew, that whether the marriage be good or not, the only time for impeaching it is at the hearing of the appeal, and if that opportunity be let slip, and the settlement be adjudicated upon, the order of sessions then made is conclusive.

Shee and Brett, contra. The decisions relied upon to shew that a marriage adjudicated upon by sessions, cannot be impugned on a subsequent appeal, do not touch the present question. In all those cases, the facts to invalidate the marriage might have been brought forward on the first appeal. It was *laches* in the parties not to have brought them forward, and therefore the rule of law, founded on convenience, is laid down, that a second trial of the same question shall not be had to supply the negligence of parties at the first trial. In this case no evidence could be adduced against the marriage on the first appeal, it took place *in facie ecclesiæ*, and, until dissolved, it was a good marriage, and the issue was legitimate. [Lord *Denman* C. J. You contend, then, that the adjudication may be got rid of, as to all the children, named or not?] That is the proposition contended for, although it is only necessary to maintain the distinction pointed out from the bench, that the pauper in this case was not named in the order, and that the facts shew he was not the son (legally) of the person who contracted the void marriage. It is clear, as a proposition of law, that though an order of removal, confirmed on appeal, is conclusive as to the settlement at the time of the order, any subsequent fact, coupled with others, may be given in evidence on another appeal to prove a fresh settlement. *Rex v. Barham* (a), *Rex v. Fillongley* (b). In all the cases referred to no new fact was submitted in evidence, the marriage could have been shewn to be void on the first as well as on the second appeal. Here, the decree of the Ec-

(a) 8 B. & C. 99.

(b) 2 T. R. 709.

clesiastical Court was a new fact, which no diligence on the part of the appellants could have procured on the former appeal. As to respiting the appeal from sessions to sessions, it was not competent to the parties so to do, and it could only be done by the permission of the Court. On the hearing of the second appeal the decree of the Ecclesiastical Court, which, on this question, is a court of exclusive jurisdiction, was put in evidence, and therefore, according to the decision of *Eyre C. J.*, in the *Duchess of Kingston's case*(a), being a judgment *in rem*, is conclusive on the fact of the marriage. The former order of sessions was not a judgment on the marriage, which only came incidentally before them; it is impossible, therefore, that that order can be conclusive on the fact of marriage. If it is not conclusive, a subsequent decree, shewing the marriage to be void, destroys the derivative settlement which would have been obtained through *Shrubsole*, the father, if the marriage had been a good one.

1838.

 The QUEEN
 v.
 Inhabitants of
 WYE.

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—In this case the pauper's father and mother, as man and wife, with their six children, were removed by an order, naming them, and dated in June, 1833, from Eastling to Wye. An appeal was entered and respited at the following July sessions, and after another respite, the order was confirmed at the Epiphany sessions, December 31st, 1833. Pending this appeal, and before the confirmation of the order, the churchwardens of Wye had instituted proceedings in the Ecclesiastical Court to annul the marriage between the father and mother as incestuous; and on the 1st May, 1834, by a decree of that Court, the marriage was for this reason dissolved, "as having been absolutely null and void from the beginning, to all intents and purposes in the law." At the date of the order the pauper was alive, but was not named in it nor removed by it. He

(a) 11 St. Tr. 261.

1858.

The QUEEN
v.
Inhabitants of
WYE.

was born during the existence of the marriage; and at that date was unemancipated and without any acquired settlement. He was now, by the order at present in question, removed to Wye; and the only point which we have to consider is, whether the first-named order, with proof that the pauper was born during the existence of the marriage, conclusively proves a derivative settlement for him in the parish of Wye. Our opinion is, that it does not.

The judgment of the Court of Quarter Sessions, upon the former appeal, decided *directly* the settlement of the persons included in the order; and this being a judgment *in rem*, was conclusive not only between the parties, but against all the world. In order to arrive at this judgment as to so much of it as affected the wife and children, it was necessary for the Court, and within its competence, to examine into and determine both the fact and legality of the marriage. And although the last-mentioned matter was only incidentally within the cognizance of a temporal court, and therefore it might have seemed, according to the judgment delivered by *De Grey* C.J. in the House of Lords, on the trial of the *Duchess of Kingston* (a), that the order was no evidence with regard to it in any future proceeding; yet numerous cases have decided that orders of removal, unappealed against or confirmed on appeal, are not only evidence, but conclusive as to all the facts mentioned in them, and which are necessary steps to the decision. Marriage, and the legitimacy of children, are among the facts as to which this rule has been upheld; and it has been extended to the case of a child emancipated at the date of the order; *Rex v. Catterall* (b); and even to that of children unborn at the time; *Nymphsfield v. Woodchester* (c), and *Rex v. St. Mary, Lambeth* (d). These, and many other cases, have formed a class which has settled the practice at quarter sessions; and it is so especially desirable, with regard to this branch

(a) 11 St. Tr. 261.

(b) 6 M. & S. 83.

(c) 1 Burr. S. C. 191, and 2 Stra. 1172.

(d) 6 T. R. 615.

of the law, to avoid all uncertainty and all subtle distinctions, that we should upon no account think ourselves justified in throwing any doubt upon these decisions.

The principle, however, on which these cases mainly proceed, is a perfectly sound one,—that a matter once examined into and decided by a competent tribunal, shall not be re-agitated and in effect shewn to have been decided erroneously upon new evidence, which either could or could not have been, but in fact was not produced upon the former hearing. And accordingly it is observable, that in all the cases where the conclusive effect of the former order has been disputed, it has been the object of the party tendering the rejected evidence to procure a contrary decision *upon the same state of facts* by throwing new light upon them. Thus, for example, in *Nympsfield v. Woodchester* (a), and *Rex v. St. Mary, Lambeth* (b), the marriages were in fact equally as void at the respective dates of the prior orders as of the later; but the evidence failed to prove them so. If the new and better evidence had been admitted on the second appeal, the effect must have been—not indeed to destroy the *legal effect* of the former adjudications on the points decided, i. e. the settlement of the parties actually removed—but, by shewing them to have been erroneously decided, to take away their effect upon settlements derivative from the former; and the Courts have rightly said, “the opportunity for this is past.” But in the case now before the Court, a new state of facts has arisen since the former decision. An incestuous marriage, until avoided by the sentence of the Court Christian, is voidable only, and remains valid to all civil purposes. The judgment of the Court of Quarter Sessions having passed before the sentence pronounced, was therefore correct in fact and in law. No alteration of the evidence, consistent with the state of facts then actually subsisting, ought to have made any difference in it. Had the incest *de facto* been ever so clearly made out, still the marriage must have been held valid, the children legitimate,

1838.
The QUEEN
v.
Inhabitants of
WYE.

(a) 1 Burr. S. C. 191, and 2 Stra. 1172. (b) 6 T. R. 615.

1838.
 The QUEEN
 v.
 Inhabitants of
 WYE.

and all the civil consequences as to the settlement of the wife and children named in the order must have followed. Whatever therefore has been decided upon the then existing state of facts remains unimpeached.

But the settlement of the pauper now comes in question for the first time; and it is admitted that he has no settlement in Wye, except upon proof that he is the legitimate son of his father. The former order, with proof of the date of his birth, is, no doubt, *prima facie* evidence of his legitimacy. But, suppose the appellants had tendered evidence that his father had been absent in America for a year before his birth, while the mother was in England, in order to shew him a bastard,—can it be doubted that such evidence would have been receivable? It would have contravened no fact found or matter decided by the former order; it would merely have cut the link which connected, *prima facie*, his settlement with that found by the former order. It does not appear to us that the evidence tendered in the present case differs at all in principle from that just supposed. The appellants admit the former case rightly decided, that the settlement was, as there found, and the marriage then valid; but they say the decree of the Ecclesiastical Court shews that the pauper is, and always was, a bastard. Whatever be the conclusiveness of a former order on the facts found by it, it cannot, in point of time, extend beyond its date; it conclusively shews the state of facts then existing, and declares the law that results from it. But what is so shewn conclusively then, may not continue; a change of circumstances may occur, to which the former finding is inapplicable.

We are of opinion therefore that, consistently with all the former decisions, and desiring in no way to break in upon them, the sessions were wrong in refusing the evidence tendered; that the respondents did not, by their proof, make out conclusively a derivative settlement in Wye; and consequently that the order must be quashed.

Order of Sessions quashed.

1838.

The QUEEN v. The JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, in a suit of CHESTERTON and another v. FARLAR.

Friday,
January 12th.


CRESSWELL, in Michaelmas term last, had obtained a rule, calling upon the Judicial Committee of the Privy Council to shew cause why a writ of prohibition should not issue to them to prohibit the said Judicial Committee and the plaintiffs in the above suit from further proceeding in the matter.

By the affidavits on which the rule was obtained, it appeared that in June, 1835, the plaintiffs, who were churchwardens of St. Mary Abbots, Kensington, instituted a suit in the Consistory Court of London, against the defendant, to enforce the payment of a certain church rate. The rate in question was made on the 28th June, 1833, and, as set out in the plaintiffs' libel, was expressed to be for repairing, cleansing, preserving, supporting, and amending the said parish church; and for and towards the defraying and indemnifying the churchwardens of the said parish of and from all incidental costs and expenses they may be at or put unto touching or concerning the said office of churchwardens, at 4*d.* in the pound, according to the yearly rent or yearly value of the same, for the year from Lady-day, 1833, to Lady-day, 1834, which assessment, and the monies to be collected therefrom, are to be duly accounted for according to law.

The answer put in by the plaintiffs to the defendant's allegation was rejected by Dr. *Lushington*, the judge of the Consistory Court, and thereupon the plaintiffs appealed to the Arches Court of Canterbury from this decision, which the learned judge, Sir *Herbert Jenner*, overruled, and admitted the plaintiff's articles of proof in support of it. The affidavit then stated, "that thereupon the said *William Farlar* duly appealed from the said decision of the

The defendant had been libelled in the Ecclesiastical Court for non-payment of a church-rate: he alleged in his answer that the rate was retrospective: the plaintiff answered, that the rate was in part retrospective, but alleged that it was applied to the payment of accounts for the current year: the judge of the Ecclesiastical Court rejected the plaintiff's answer. The plaintiff appealed to the Court of Arches, who reversed the decision; the defendant then appealed to the Privy Council, and before any proceedings were taken applied to this Court for a prohibition:—Held, that there was no ground for prohibition, as the Court would intend

that the Privy Council would decide the appeal properly.

1838.

 The QUEEN
 v.
 Judicial
 Committee of
 the PRIVY
 COUNCIL.

Arches Court to his late Majesty in Council, and that thereupon such appeal was duly referred to the Judicial Committee of the Privy Council, and that upon such appeal and reference this suit has become and now is depending before this Judicial Committee of the Privy Council."

By the articles and answers exhibited in the Spiritual Courts, it appeared that the defendant resisted the rate on four grounds: 1. That the rate was made for purposes unconnected with the church; 2. That it was unequal; 3. That it was not made upon all the rateable property in the parish; 4. And principally that the rate was retrospective.

The answer of the plaintiff (which was rejected by Dr. *Lushington*, but admitted by Sir *Herbert Jenner*), admitted the rate to be in part retrospective, but alleged that it was applied principally to current accounts of tradesmen for the preceding year.

Cause was shewn against this rule by *Holt* in Michaelmas term last (Nov. 23rd), and again on this day by

Sir *W. W. Follett*. The only question to be decided now is, whether the Judicial Committee of the Privy Council have jurisdiction over the validity of a church rate? If they have, there is no pretence for a prohibition, for they have taken no step in the matter, and consequently have done nothing in derogation of the common law. Supposing the judgment of Sir *Herbert Jenner* to be erroneous, the Court will intend that the Privy Council will overrule it. The 2 & 3 *Will. 4*, c. 92, expressly transfers all the powers of the High Court of Delegates to her Majesty in Council; and the spiritual courts not being inferior courts, as was distinctly laid down in *Bodenham v. Ricketts*(a), this Court will not interfere by prohibition, unless there is an excess of jurisdiction, or matters are inquired into only conusable at common law. The subject-matter of this appeal is within the cognizance of the spiritual courts, and the Privy Council have taken no step whatever so as to call for the interference of this

(a) 4 A. & E. 433.

Court. On this view of the question it is unnecessary to contend for the validity of the rate(a).

1838.
The QUEEN
v.
Judicial
Committee of
the PRIVY
COUNCIL.

Cresswell and *Chandless*, contra. It cannot be contended, after *Darby v. Cosens* (b), that a party is precluded from obtaining a prohibition because he has appealed to a superior Court. It may often happen that a party is obliged to appeal to enable himself to obtain prohibition; for if the sentence is against him in the court below, it would be too late to apply for prohibition unless he appeal. No answer is made to the affidavit of the defendant, that the churchwardens commenced a suit in the Ecclesiastical Court, and that it is now pending before the Privy Council. It must be assumed upon that allegation, that all has been rightly done in order to bring the matter before that Court. 'When it is said that this is a matter of ecclesiastical cognizance, and therefore that prohibition does not lie, there are numerous authorities to shew that a retrospective rate like the present is bad. [*Coleridge J.* Do you contend that a bad church rate is out of the jurisdiction of the spiritual courts?] Whenever it appears that the only question at issue is the enforcement of a rate which is bad at common law, this Court will interfere by prohibition. In *Byerly v. Windus* (c), *Bayley J.* observes, "When once it appears by the proceedings in the spiritual court that the prescription (which was the matter at issue in that case), instead of being admitted is disputed, and that the parties are in progress to bring its existence to trial, the prohibition is grantable at once." It appears equally in this case, that the only struggle in the Privy Council is to enforce a rate which is bad at common law.

Lord DENMAN C. J.—The question in dispute here was

(a) *Holt*, in Michaelmas term, that part of the argument.
contended for the validity of the rate, but the decision of the Court renders it unnecessary to go into (b) 1 T. R. 552.
(c) 7 D. & R. 564; S. C. 5 B. & C. 1.

1838.

The QUEEN
v.
Judicial
Committee of
the PRIVY
COUNCIL.

as to the validity of a church rate, which is clearly a matter of ecclesiastical cognizance, and it was taken before the Judicial Committee of the Privy Council as an appeal by the very party who now requires a prohibition to restrain them from hearing it. Assuming, as we must do, that that is a court of appeal from the spiritual court, we are also bound to assume that they will decide rightly the question brought before them. The case of *Byerly v. Windus (a)*, which has been cited as an authority for the prohibition, appears to us to furnish a distinct principle on which it should be refused, for it lays down, that when the subject-matter is originally of ecclesiastical jurisdiction, prohibition does not go, unless the spiritual court is about to try some matter conusable only at common law. The subject-matter of this suit, on the contrary, is within the conusance of the spiritual courts; they are bound to keep within the rules of the common law in forming their decision; and this Court cannot imply that they will decide wrongly.

LITLEDAL J.—There is no doubt that the validity of a church rate may be inquired of in the ecclesiastical courts. The party applying for the prohibition has himself carried it before the Judicial Committee of the Privy Council on appeal, and has thereby admitted that they have cognizance of the subject-matter. Before this Court can interfere, it should be seen that the court below has decided wrongly, or is about to entertain some question conusable only at common law. This case does not fall under either of these predicaments.

WILLIAMS J.—The Judicial Committee of the Privy Council is substituted by the 2 & 3 Will. 4, c. 92, for the High Court of Delegates, and is therefore now the court of appeal. Nothing erroneous has yet taken place in that Court, and it would be quite contrary to the usual tenor of legal presumption to assume that any erroneous decision will be

(a) 7 D. & R. 564; S. C. 5 B. & C. 1.

arrived at. If any error had been committed against the rules of the common law, this Court would probably interfere.

COLERIDGE J.—I am of the same opinion. If Mr. *Cresswell's* argument were maintainable, we should be required to lay down a rule that would tend to oust the ecclesiastical courts of all jurisdiction whatsoever. In every case there is a right and a wrong side of the question, and if we were to side always with what we deem the right, and issue a prohibition to prevent those Courts from arriving at a conclusion which we consider wrong, the consequences which I have pointed out would arise. Nothing has yet been done in those Courts in derogation of our common law jurisdiction, so as to call for our interference.

1838.
The QUEEN
v.
Judicial
Committee of
the PRIVY
COUNCIL.

Rule discharged without costs (a).

(a) See 2 Rol. Abr. 319, (N. 2), had by appeal, prohibition does acc. that where remedy may be not lie. *Clark's* case.

The QUEEN v. The Recorder of the Borough of
CARMARTHEN.

AN appeal against the borough rate for this borough, in the nature of a county rate, had been lodged at the quarter sessions for the borough on the 24th February, 1837, and was respited to the next quarter sessions held on 17th May.

Due notice of the appeal was served on the respondents (b). But, on the hearing of the appeal, it was objected, on the part of the respondents, that, under the pro-

(b) The respondents were the mayor, town clerk, high constable, churchwardens, and overseers.

the town clerk is sufficient, as he is the officer of the town council, who made the rate.

Saturday,
January 13th.

Under sect. 92 of the Municipal Corporation Act, which gives an appeal against the borough rate, and empowers the recorder to hear and determine the same as in the case of an appeal against any county rate, notice of the appeal to

1838.

The QUEEN
v.

CARMARTHEN.

visions of the 57 *Geo.* 3, c. 94, s. 2, notice of the appeal should have been served on the clerk of the peace for the borough, and that he should have been made a party.

The recorder was of this opinion, and dismissed the appeal.

E. V. Williams having obtained a rule nisi, in Trinity term last, for a mandamus to the recorder of the borough of Carmarthen, to cause continuances to be entered in this appeal, and to hear and determine the same, cause was now shewn against it by

Chilton. The question is, whether sect. 92 of 5 & 6 *Will.* 4, c. 76, which authorizes the levying a borough rate, and gives an appeal against it, applying all the provisions of the acts relating to county rates, does not require notice of the appeal to be given to the clerk of the peace of the borough, as the 57 *Geo.* 3, c. 94, s. 2, does to the clerk of the peace of the county. By sect. 103 of 5 & 6 *Will.* 4, whenever there is a separate court of quarter sessions in any borough, a clerk of the peace is to be appointed; the notice, therefore, should have been given to him. It seems to have been thought that giving notice to the town clerk would suffice, but that does not satisfy the words of the 57 *Geo.* 3, c. 94, s. 2. The 55 *Geo.* 3, c. 51, which was an act to amend an act of *Geo.* 2, for the regulation of county rates, did not require any notice to be given of an appeal. It was amended by the 56 *Geo.* 3, c. 49, sect. 5 of which requires the appeal to be made to the next quarter sessions, and fourteen days' notice of it to be given, but does not specify to whom the notice is to be given. Then the 57 *Geo.* 3, c. 94, s. 2, requires the fourteen days' notice to be given to the clerk of the peace. All these acts are made applicable to an appeal against a borough rate at the quarter sessions of the borough. And by sect. 103 of 5 & 6 *Will.* 4, c. 76, there cannot be a recorder to a quarter sessions without a clerk of the peace. Notice, therefore, should be always given to him.

E. V. Williams, contra. Sect. 92 confers three distinct powers:—1st, the power to make a borough rate; 2nd, the power of appealing; 3rd, the power in the recorder to hear and determine the appeal. The power of appeal is given absolutely, without any notice or other condition being required, in like manner to the power of appeal given by 55 *Geo. 3*, c. 51. The power to hear and determine the appeal is quite a distinct clause from the power of appealing, and therefore, although the words of the section authorize the recorder to hear and determine the appeal, “as in the case of an appeal against any county rate,” those words are not to be imported into the clause which gives the power of appeal absolutely. The 57 *Geo. 3*, c. 94, s. 2, requiring notice on a county appeal to the clerk of the peace, is no where mentioned or referred to in the Municipal Corporation Act. It is contended, therefore, that under this section no notice is required at all; and no inconvenience would arise from this construction of the act, for the recorder may make any rule of practice as to the notice to be given before he will *hear* an appeal. But whether notice is required or not, it is impossible to import all the requisites for a county appeal into a borough; for the 57 *Geo. 3*, requires that notice is to be given to the constable of the hundred; in a borough there is no such officer. Again, there may be an appeal in a borough against a borough rate where there are no quarter sessions, and therefore no clerk of the peace to whom it can be given.

Since, therefore, a literal compliance with the requisites of the statute is impossible, it is sufficient if there be a substantial compliance. Now the reason why the particular persons, to whom the stat. 57 *Geo. 3*, c. 94, requires notice to be given, were selected, is obvious. Notice is to be given to the hundred constable, because he is to collect the rate when made. It is to be given to the clerk of the peace, because he is the officer of the justices in quarter sessions who made the rate. But the council are the parties who make the borough rate, and the town clerk is

1838.

 THE QUEEN
 v.
 CARMARTHEN.

1838.

The QUEEN
v.
CARMARTHEN.

their officer, standing in the same relation to the council, the makers of the borough rate, as the clerk of the peace does to the justices in quarter sessions, the makers of the county rate. The clerk of the peace of the borough is in no respect the officer of the makers of the borough rate: he is the officer of the quarter sessions of the borough, and not of the council; and notice to him would be altogether nugatory. Admitting, therefore, that the stat. 57 Geo. 3 applies to appeals against borough rates, its requisites as to notice have been in this case substantially complied with; because notice has been given to the town clerk, the officer and professional adviser of the council, the makers of the rate.

LORD DENMAN C. J.—I think that the recorder should enter continuances in this case and hear the appeal; for it appears to me that the notice which has been sent is sufficient, as it has been served upon the town clerk, who is the servant of the parties who made the rate, and who, therefore, received it through him. The 92d sect. applies the provisions of the statutes relating to county rates to borough rates, but uses the expression “as near thereto as the nature of the case will admit;” we must, therefore, look, not to the actual words, but to the principle and spirit of the previous enactments. I think the town clerk is the proper person on whom the notice should be served, and not the clerk of the peace, for he has nothing to do with the town council or the making of the rate.

At the same time I should be sorry to have it supposed that no notice, as has been contended, is necessary. In the case of *Rex v. The Recorder of Poole*(a), it was distinctly understood that all the provisions of the county rate acts, as far as they are applicable, applied to rates in boroughs.

LITLEDALE J.—I also think that notice is necessary. The 57 Geo. 3 requires the notice to be sent to the clerk of

(a) 1 Nev. & Per. 756.

the peace, but the clerk of the peace in a borough has not the same functions as the clerk of a county with regard to a county rate; the town clerk in that respect answers to the description. I therefore think notice upon him is sufficient.

1838.

 The QUEEN
 v.
 CARMARTHEN.

WILLIAMS J.—I am of the same opinion. A proper notice in this case has been served upon all parties, except upon the clerk of the peace. When we look at the words of sect. 92 of 5 & 6 Will. 4, “as near thereto as the nature of the case will admit,” it is impossible to resist the weight of the argument, that some of the provisions of the county rate statutes were not intended to be applied. All that is required is, an approximation to what is pointed out in them to be done in an appeal against a county rate. I think that what has been done in this instance satisfies the statute.

COLERIDGE J.—I think that notice is requisite to be given under this act, and that in this case notice has been given. The words in sect. 92, which enable the recorder to hear and determine the appeal, and to award relief in the premises, as in the case of an appeal against any county rate, must be thrown back upon all the powers given in the section with regard to the rate, and, if so, they include the condition of a notice being given as in the case of a county rate. But as the section only requires those acts to be complied with, as nearly as the nature of the case will admit, a compliance in substance, not in terms, is all that is required. The reason why the legislature required notice to be given to the clerk of the peace in counties is, because he is the officer of the magistrates by whom the rate was made, and on whom it would be highly inconvenient to serve the notice. This act separates the duties of making the rate and of hearing the appeal against it; on whom, therefore, ought the notice of appeal to be served? it is clear that it ought to be on those who

1838.

The QUEEN
v.
CARMARTHEN.

made the rate. Notice, therefore, ought to be given to the town council, who made the rate, and it has been given to them through the town clerk, who is their officer.

Rule discharged.

Monday,
Jan. 15th.

GILLETT v. ABBOTT.

Declaration, that by indenture, reciting that by a prior deed the plaintiff had been appointed trustee of a company thereby established, the defendant covenanted to indemnify the plaintiff, on retiring from his trusteeship, from all liability attaching to him as such trustee, and that a liability had so attached, from which the defendant had refused to indemnify him. Plea, that the liability in question was incurred by the plaintiff as shareholder, and not as trustee:—Held, that the admission in the plea of the trust deed so referred to in the recital, did not dispense with the production of the deed in evidence, in order to shew the nature of the trusts created by it.

DECLARATION—that heretofore, to wit, on &c., by a certain indenture made between the defendant, *A. B.* and others, of the first part—the defendant, said *A. B.* and others, of the second part—the defendant and others, of the third part—the plaintiff, of the fourth part— and the defendant and *L. S. C.*, of the fifth part,—which said indenture, sealed with the seal of the defendant, and bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, the plaintiff now brings into Court here. After reciting that by a certain other indenture, bearing date on or about the 25th day of March, 1836, and made between the several parties whose names are thereunto subscribed, and whose seals are thereunto affixed (except the several persons, parties thereto, of the second and third parts,) of the first part—the defendant and said *T. H.*, of the second part—and said *J. B.* and the plaintiff, of the third part,—certain covenants and provisoes were entered into by and between the said parties thereto for the establishment and regulation of the London Patent Cork Manufactory, and by virtue thereof *the said Jeremiah Barrett and the plaintiff became the trustees thereof*; and also further reciting that the plaintiff was desirous of retiring and being discharged from the said trusts; and that the parties to the said first-mentioned indenture, of the third part, were desirous that said defendant and said *L. S. C.* should be trustees in the place and stead of said plaintiff and said *Jeremiah Barrett*, and that said *Jeremiah Barrett* should

1838.

GILLETT
v.

ABBOTT.

also retire from said trust. And that it had been agreed that the plaintiff should enter into such covenants as are in said first-mentioned indenture after contained, and in consideration thereof should have such immediate and other release and indemnity as are thereafter also contained; and that said defendant and said *L. S. C.* had agreed to concur in said arrangement, and to accept said trust, the defendant did covenant, promise and agree to and with the plaintiff, his heirs, executors and administrators, that he, the defendant, the said *A. B.* and others, their heirs, executors or administrators, some or one of them, should and would, from time to time and at all times thereafter, well and sufficiently save harmless and keep indemnified the plaintiff, his heirs, executors and administrators, and his and their estate and effects, real and personal, of and from all actions, suits, loss, costs, charges, damages and expenses whatsoever *by reason of or in anywise concerning the trusts of the aforesaid deed of settlement or other aforesaid deeds or instruments, or any of them, or by reason or in consequence of his having been such trustee as aforesaid.* And it was by the said first-mentioned indenture further agreed, that upon the execution of said first-mentioned indenture said plaintiff should deliver to said defendant and said *L. S. C.*, as such new trustees as aforesaid, all the funds and property of said London Patent Cork Manufactory in his, said plaintiff's, possession, or under his control, save and except the several deeds, which were to remain in the custody of said plaintiff, his executors or administrators, until performance of the covenants of the other parties in said first-mentioned indenture contained, as by said indenture, reference being thereto had, will more fully appear. Averment of performance by plaintiff. Breach, that after the making of the said indenture, to wit, on &c., certain persons carrying on business by the name and firm of *J. and S.*, to whom said London Patent Cork Manufactory was indebted in a large sum, to wit, &c. for goods sold and delivered before the making of said indenture, by said *J. and S.*, to and for the use of said

1838.
GILLETT
v.
ABBOTT.

manufactory, and for which said debt, so due and owing to said *J. and S.*, the plaintiff, by reason and in consequence of his having been trustee as aforesaid of the said London Patent Cork Manufactory, was liable to said *J. and S.*, demanded of and from the plaintiff payment of said debt, to wit, &c., and then threatened to commence legal proceedings against the plaintiff for the recovery thereof; of all which several premises the defendant and said *A. B.* and others then had due notice, and were then and each of them was requested to pay said debt, to wit, &c. and to indemnify or save harmless the plaintiff against the same; but the defendant and said *A. B.* and others, and each and every of them, then wholly neglected and refused so to do, and by reason thereof the plaintiff was then obliged to pay, and then did pay, said debt so due and owing from said London Patent Cork Manufactory, to wit, &c. to said *J. and S.*; and the plaintiff avers that the same was a loss, charge, damage and expense occasioned by reason of and concerning the trusts of the aforesaid deed of settlement, and by reason of and in consequence of his, the plaintiff's, having been such trustee as aforesaid: and that the same was not occasioned by the wilful act, default, or procurement of him, the plaintiff. And so the plaintiff says &c., to plaintiff's damage of 100*l.*

Plea,—that the plaintiff became and was liable to said alleged debt to said *J. and S.*, by reason of his being, when the same occurred, a partner and shareholder in the said company and partnership in said indenture and declaration mentioned, and therein called the London Patent Cork Manufactory, without this, that said plaintiff was liable to said *J. and S.* for said debt so due and owing to said *J. and S.* by reason or in consequence of his having been trustee as aforesaid of said London Patent Cork Manufactory, or that said loss, charge, damage or expense, in the said declaration mentioned, was a loss, charge, damage or expense occasioned by reason of or concerning the trusts of the aforesaid deed of settlement, or by reason of or in consequence of his,

the plaintiff's, having been such trustee as aforesaid, in manner and form as the plaintiff hath in his said declaration in that behalf above alleged; and of this said defendant puts himself upon the country, &c.

At the trial of this cause, before Lord *Denman* C. J., at Guildhall, at the sittings after last Michaelmas term, it was proved for the plaintiff that he and a person of the name of *Barrett*, conducted the business of the Patent Cork Company, at Holland Street, Blackfriars, under the names of *Barrett* and *Gillett*. Certain goods were supplied to the Company on the credit of Messrs. *Barrett* and *Gillett*, which they were obliged to pay for. It was proved also, that the defendant, who was a shareholder, used to come frequently to the premises in Holland Street, and inspect the books, and that he complained that more business was not done. It was objected for the defendant, that as the plaintiff claimed in his character of trustee, the deed which created the trusts, and which was in part recited in the deed of indemnity declared upon, ought to be produced. His lordship was of this opinion, and, as the deed was not forthcoming, directed a nonsuit to be entered.

Sir *J. Campbell* A. G. now moved to set aside the nonsuit and for a new trial. It is admitted by these pleadings that the plaintiff was trustee for the Cork Company,—that with his co-trustee he had possession of the funds of the Company,—that the debt in question was incurred for the Company, and that the plaintiff paid it. The only issue raised was, that the plaintiff was not liable to the debt “as such trustee as aforesaid.” The evidence offered was quite sufficient for a jury to decide upon. [Lord *Denman* C. J. The question at the trial was, whether he was liable as a trustee or as a shareholder of the Company. If there had been any evidence of the goods being supplied to him as trustee, I should have left it to the jury; but there was none; and I considered, as the trusts were created by deed, and that deed was incorporated in the deed of covenant, the

1838.



GILLETT

v.

ABBOTT.

1838.

 GILLETT
 v.
 ABBOTT.

instrument ought to be produced, in order to see what they were.] It being proved that the Company had the goods, it was evidence for the jury that he had ordered them for the Company, as it is recited in the deed of indemnity that the plaintiff had been trustee for the Company.

Besides, as the defendant was a party to the former deed, it was unnecessary to call the subscribing witness to it. [Coleridge J. Would that fact enable you to dispense with proof as to more than the part set out? Mr. *Starkie* (a) lays down, that if the defendant, by his plea, admit the execution of a deed, he only admits so much as is recited in the declaration; and if the plaintiff relies on other recitals, not specified in the declaration, he must prove the execution of it; and for this position he cites *Williams v. Sills* (b) and *Watson v. King* (c).] Those cases rest upon no principle; for the only object of proving the execution of a deed is to establish its identity: when a defendant once admits that, on what ground can it be necessary to prove it for some other recital in the deed?

LITLEDALE J.—I think there should be no rule in this case. A trust may be created by a verbal appointment; but when it appears, as in this case, that it was created by deed, the instrument ought to have been produced, in order to shew what the trusts were. It might be that they did not authorize the contracting any debt for the Company. I also think that proof of execution cannot be dispensed with, because a part of the deed not relied upon is recited in the deed of covenant declared upon.


WILLIAMS J.—It would appear here that the plaintiff was both a trustee and a shareholder of the Company; and it certainly seems ambiguous in which character he carried on the business of the Company. But the question being, whether his liability accrued as trustee, it became ne-

(a) 2 Stark. on Ev. 2d ed. 247.

(c) 4 Camp. 272.

(b) 2 Camp. 519.

cessary to shew the deed by which his trusteeship was created.

1838.

 GILLETT
 v.
 ABBOTT.

COLERIDGE J.—The precise issue raised was, the character under which the plaintiff became liable for the debt in question. As soon as it appeared that he referred his liability to his character as trustee, it was essential to produce the deed creating it; and I think there was not enough of it recited in the declaration to waive due proof of execution.

Lord DENMAN C. J.—Unless we are prepared to overrule the two cases referred to (*a*), we must hold that proof of the deed was necessary; and that the plaintiff was not in the situation to produce.

Rule refused.

(*a*) *Williams v. Sills, Watson v. King, ante, 28.*

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TISDELL v. COMBE.

Tuesday,
Jan. 16th.

TRESPASS for breaking and entering the plaintiff's dwelling-house and distraining his goods. Plea: not guilty.

By the consent of the parties the following facts were stated for the opinion of the Court, under 3 & 4 Will. 4, c. 42.

The plaintiff has been for some time the master of a Gravesend and London steam vessel, called the *Star*, and the defendant is a magistrate. On the 19th September, 1834, the defendant, as such magistrate, issued a warrant to levy on the plaintiff *3*l.**, for a conviction under 7 & 8 Geo. 4, c. lxxv (local and personal), for navigating the said *Star* upon the river Thames, below London Bridge, at Limehouse, at a greater rate than five miles an hour.

The following bye-law, upon which the conviction took

Under sect. 57 of the Waterman's Act (7 & 8 Geo. 4, c. lxxv), the court of mayor and aldermen are enabled to make bye-laws for the regulation of "boats, vessels and other craft to be rowed or worked within the limits of the act:"—Held, that these words include steam-boats.

1838.

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TISDALE
v.
COMBE.

place, was made at a court of mayor and aldermen of the city of London, in April, 1828.

"That no steam boat or vessel shall navigate upon the said river between London Bridge and the eastern limits of Limehouse Reach, at any greater rate or speed than at and after the rate or speed of five miles or knots in an hour; and if the owner, master, pilot, or other person having the management or command of any such steam-boat or vessel, shall navigate the same within the last-mentioned limits at any greater rate or speed than as aforesaid, he shall forfeit and pay for every such offence any sum not exceeding five pounds."

By sect. 57 of 7 & 8 Geo. 4, c. lxxv, intituled, "An Act for the better Regulation of the Watermen and Lightermen on the River 'Thames, between Yantlet Creek and Windsor," it is enacted, "that it shall be lawful for the said court of mayor and aldermen, and they are hereby empowered, from time to time, to make and set down in writing such rules and bye-laws as they shall think proper, for the government and regulation of the said company, and their widows and apprentices, and the boats, vessels, and other craft to be rowed or worked within the limits of this act, and to annex reasonable penalties and forfeitures for a breach of such rules and bye-laws respectively, not exceeding the sum of 5*l.* for any one offence, provided the same rules or bye-laws be not inconsistent with any of the laws of this kingdom, or the provisions and directions in this act contained, or any of them; and also from time to time to alter, amend, repeal, or make void such rules and bye-laws, or any of them, or any rules or bye-laws which shall have been made at any time or times by the said court of master, wardens, and assistants, and approved and allowed as hereinbefore and hereinafter is mentioned, so as, after the making, altering, amending, and repealing thereof respectively, the said rules and bye-laws to be made by the said court of mayor and alderman, and every such alteration, amendment, and repeal of any such rules or bye-laws,

or of any rules or bye-laws to be made, allowed, or amended by the said court of master, wardens, and assistants, and approved or repealed by the said court of mayor and aldermen, be allowed as hereinafter mentioned.

The bye-law in question was duly allowed, as required by the act of parliament. The plaintiff is a freeman of the Waterman's Company. The Star is of the registered burden of 187 tons. It is not licensed under sect. 41 of the first-mentioned act, but under the 3 & 4 Will. 4, c. 55, and in its certificate of registry is denominated a ship or vessel.

The question for the Court is, whether the court of mayor and aldermen had power, under the 7 & 8 Geo. 4, c. lxxv, to make the above bye-law; judgment to be entered accordingly.

Cleasby for the plaintiff(a). As sect. 57 of the Watermen's Act gives the power to the mayor and aldermen to impose penalties, it must receive a strict construction from the Court. The title of the act, which is "for the better Regulation of Watermen and Lightermen on the River Thames," the silence as to steam-boats in every part of the act, and the words of the clause in sect. 57, "the boats, vessels, and other craft to be rowed or worked," shew that steam-boats were not contemplated by the legislature at all. The word "vessels," is no doubt of larger import than "boat," but the rule of construction is, that words of more general meaning following words of limited application, are to be restricted to classes *ejusdem generis*; *Sandiman v. Breuch*(b), *Cusher v. Holmes*(c). All the provisions of the act seem to apply to boats navigated by watermen only, and the word "vessel" is always used with the same limited signification as boat. Thus sect. 36 enacts that "no apprentices shall have the sole care of any boat or

1838
TISDELL
v.
COMBE.

(a) In Michaelmas term last, before Lord Denman C.J., *Patterson, Williams, and Coleridge Js.* (b) 9 D. & R. 796; S. C. 7 B. & C. 96. (c) 2 B. & Ad. 592.

1838.

 TISDELL
 v.
 COMBE.

other vessel," except under certain conditions. In sect. 37 there is a distinction drawn between a "ship or vessel," which might include steam-boats, and the craft contemplated by this act. It enacts that no one but a member of the Waterman's Company shall ply any wherry, lighter, or other craft from or to any ship or vessel, for hire, within the limits of the act. The inference from all these provisions is obvious, that if the legislature intended to include such an important subject as steam-boats within their provisions, they would have been mentioned by name.

No one appearing for the plaintiff, the case stood over till this term, when the Court heard

Ryland, contra. Sect. 57 gives the court of mayor and aldermen power to make bye-laws for all boats, vessels, and other craft to be rowed or worked on the River Thames. A steam-boat is a vessel worked on the river so as to come within these words; but even if the words of that section were not large enough, sect. 106(a) extends the powers given to the court of mayor and aldermen to all lighters, boats, and vessels in the river. "Craft" is a word of large signification, and is defined in *Falconer's Marine Dictionary* as "a general name for all sorts of vessels employed to load or discharge merchant ships, or to carry alongside or return the stores of men of war, such as lighters, hoys, barges, &c. He defines "vessel" to be "a general name given to the different sorts of ships which are navigated on the ocean, or on canals or rivers. It is, however, more particularly applied to those of the smaller kind, furnished

(a) Sect. 106 enacts, "that the powers given by this act to the said court of mayor and aldermen to make rules and bye-laws, to be allowed as aforesaid, shall extend and are hereby extended, and may be applied to the government and regulation of the western barges, ferries, or lighters, boats, and ves-

sels of woodmongers, and owners of lay-stalls, chalk hoys, gardeners, fishermen, and ballastmen, and all other lighters, boats, and vessels in the said river, within the limits of this act, although otherwise exempted from the provisions of this act."

with one or two masts." The rule of construction to confine vessels to boats, *ejusdem generis*, does not apply, as the enumeration does not begin with words of the largest meaning, but goes on from boats to vessels, and from vessels to craft. The object of the act was, to secure a proper control over the navigation of the river, and its objects would be almost entirely defeated if steam-boats were to be held not within it. The intention of the legislature, without doubt, was to guard against the accidents occasioned by steam-boats.

1838.
TISDELL
v.
COMBE.

Cleasby, in reply. The rule of construction as to words, *ejusdem generis*, applies specifically when a word of smaller signification heads the enumeration; *Casher v. Holmes* (a). The proviso in sect. 106, in an act like this, which is of a penal nature, cannot be extended so as to include more than is contained in a previous enactment. Besides, the terms of sect. 106 shew that it only applies to craft like western barges, and small craft of that kind. By the argument on the other side, the bye-law in question would apply to all steam-vessels coming from foreign parts, and navigated by a single freeman of the Waterman's Company. The word "craft" is defined in *McCulloch's Commercial Dictionary* as "small open vessels used in the navigation of rivers:" it is quite clear, both from this and *Falconer's* definition, that it does not include steam-boats. The intention of the legislature has been referred to, in order to shew steam-boats were included, but the intention can only be judged of by the language used, and the absence of any mention of the term, shews that they were not contemplated. Then, the statute being penal, no extension of its terms can be made, *Martin v. Ford* (b); especially as the act is private.

Lord DENMAN C. J.—It appears to me that this act of parliament does comprehend steam-boats. These boats

(a) 2 B. & Ad. 592.

(b) 5 T. R. 101.

1838.

TISDELL

v.


COMBE.

were well known at the time of the passing the act, and the term used is "boats" generally, without any particular description being given. I think, therefore, we should do great violence to the words used, if we were to say that steam-boats are not within the provision. To arrive at such conclusion we ought to be quite clear, before we deny any word its known and natural meaning, that it was not intended to be used by the legislature in that sense; so far from that being the case here, I do not even think it probable that the legislature would have excluded steam-boats; and I have no difficulty in saying that the words of the act are sufficient to comprehend them.

LITLEDALE J.—The mischief arising in the navigation of boats is much more likely to occur from steam-boats than in rowing or working small boats, and it seems to me that steam-boats fall within the meaning of the terms used. Steam-boats are not perhaps what are usually called boats, they are vessels, but the term "vessels" is also used. The act does not say any thing as to the particular description of vessels, but sect. 57 speaks of vessels to be rowed or worked. The word "worked" is a very general word, and applies as much to steam-vessels as to lighters or wherries.

WILLIAMS J.—I am of the same opinion. If it had been clearly made out that steam-boats were not intended to be included in the words "boats or vessels," the argument founded on the rule of construction referred to might have applied. The observation on the term "steam-boat" not being used may be applied on both sides, because if boat or vessel was meant to include steamers, there was no more reason for particularizing them than any other description of vessel. It is not a forced construction to hold that a steam-boat is a boat, and it certainly is a vessel, for vessel includes boats of all descriptions; and both these words are used. It is true that certain provisions may be pointed out in the act applying to boats of a smaller size, but it does not follow that words of a larger

description are to receive any limitation from that circumstance.

1838.

 TISDELL
 v.
 COMBE.

COLERIDGE J.—It is quite a mistake to call this clause a penal clause, on the contrary, I should rather say it was remedial. If we were considering the bye-law itself that argument might apply, but we have to decide whether any power exists of framing rules and regulations for steam-boats under this clause. It is said that sect. 106 cannot extend the provisions of sect. 57, as to the boats to which it applies, and no doubt it cannot, but it furnishes notwithstanding a good key for the explanation of its meaning. Speaking of certain classes of vessels which were exempted in other parts of the act, it leaves a power in the court of mayor and aldermen to make bye-laws respecting them, and the terms used shew that it applies to all other lighters, boats, and vessels within the limits of the act. It would seem, on Mr. *Ryland's* argument, that any vessel coming within the limits of the act, would fall within the scope of these rules and regulations, and it certainly would be doing violence to the words of the act if we were to hold that steam-boats, wherever they come from, were not within the words used.

Judgment for the defendant.

CHURCH v. The IMPERIAL GAS LIGHT and COKE
 COMPANY.

ERROR from the Palace Court. The declaration was in substance as follows:—The Imperial Gas Light and Coke Company, by &c., complain against *John Church*, the defendant, of a plea of trespass on the case on promises, for that defendant, on the 4th September, A.D. 1833, in the

Tuesday,
January 16th.

1. Assumpsit is maintainable by a trading corporation on an executory contract for the supply of goods, for the manufacturing

and supply of which the Company was incorporated.

2. A contract by an incorporated Gas Company to supply gas at 12*l.* 16*s.* a year is a contract of such frequent and daily occurrence that it may be made by parol.

3. Where a corporation declare in the name by which they are incorporated by act of parliament, the Court are bound even after verdict to notice that they are a corporation.

1838.
CHURCH
v.
IMPERIAL
GAS LIGHT
and COKE
COMPANY.

jurisdiction of this Court, bargained for, and agreed to take of the plaintiffs, and the plaintiffs, at the request of the defendant, agreed to supply to the defendant a certain large quantity of gas, to wit, so much gas as was necessary to furnish two lights for one year, to wit, from the 1st day of July, 1833, and so on from year to year, at and for the rate or price of 12*l.* 16*s.* per annum, for the said two lights, and the defendant in consideration thereof, and that the plaintiffs, at said request of the defendant, had then in the jurisdiction aforesaid, promised the defendant to supply the said gas to him, the defendant as aforesaid, then in the jurisdiction aforesaid, promised the plaintiffs to accept the said gas of and from the plaintiffs, and to pay them for the same at the rate or price aforesaid, quarterly, at the end of fourteen days from the end of each quarter, and to give to the plaintiffs not less than three calendar months' notice of his intending to discontinue taking the said gas, to expire at the end of the then ensuing quarter, or to pay to the plaintiffs the amount of the price of the said gas, at the rate or price aforesaid, to the end of the said ensuing quarter. And the plaintiffs say, that they always, in the jurisdiction aforesaid, during a quarter of a year, namely, from the 1st of October, 1834, to the 31st of December in the same year, were ready and willing, and tendered to supply to the defendant the said gas, and requested the defendant to accept the same as aforesaid. And the plaintiffs say, that defendant did not give to the plaintiffs three calendar months, or any longer notice as aforesaid, of discontinuing the said gas, &c.; yet defendant did not, when he was so required as aforesaid, accept the said gas of or from the plaintiffs, or pay them for the same as aforesaid, but then in the jurisdiction aforesaid wholly refused so to do. The second count was for goods and gas bargained and sold. 3rd. Goods and gas sold and delivered. 4th. Money due on an account stated; which said last-mentioned monies defendant promised to pay on request. To plaintiffs' damage of 4*l.* 19*s.* Pleas: 1st. Non assumpsit.

2d. As to the first count of the declaration, that the plaintiffs, from the 1st of October, 1834, to the 31st December in the same year, were not ready and willing, nor did they tender to supply the defendant the said gas, and require him to accept the same in manner and form &c.

The replication took issue on these two pleas. As to the first issue, the jurors found that the said *John Church* did promise, as the plaintiffs in their first, second, and fourth counts of their declaration alleged against him, and that the said *John Church* did not promise in manner and form &c., as in the said third count alleged. The damages were then assessed generally on the first, second, and fourth counts, at 2*l.* 16*s.* 6*d.*

The errors assigned were, that damages were assessed generally on the first, second, and fourth counts, and that the cause of action, in the first count mentioned, was for and in respect of the breach of the executory simple contract in that count particularly set forth; and that it did not appear, in and by the said first count, that any part of the said contract in that count was executed, and that it further appeared in and by the said count, that the said Company were a corporation. Joinder in error.

Gaselee for the plaintiff in error, in Easter term last(a). The question in this case is, whether assumpsit can be maintained by a corporation on an executory contract; for the defendants in error being constituted a corporation by a public act of parliament(b), the Court is bound to take notice of the fact; *Broughton v. The Manchester Waterworks Company*, per *Holroyd J.*(c). It is not disputed that a corporation in certain excepted cases, may make a contract, not under seal, but then it must be for works of immediate necessity, *Horn v. Ivy*(d); or where the object of the incorpora-

1838.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

Third point:
 Assumpsit not
 maintainable
 by a corpora-
 tion on an
 executory con-
 tract.

(a) Friday, April 28th, before Lord Denman C. J., *Patteson* and *Coleridge Js.*

(b) The 1 & 2 Geo. 4, c. xvii,

local and personal, but made a public act.

(c) 3 B. & Ald. 1.

(d) 1 Vent. 47.

1838.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

tion requires contracts by parol to be made; *Com. Dig. Corporation, Bac. Abr. Corporation (E.)*; and in *Stark v. The Highgate Archway Company (a)*, it was agreed by the Court that assumpsit would not lie against a corporation, unless the act incorporating the company impliedly gave them power to make a promise. Upon this principle *Murray v. The East India Company (b)*, and that class of cases, were decided. So also a corporation may sue for use and occupation in debt, *Dean and Chapter of Rochester v. Pierce (c)*; or in assumpsit, *The Mayor of Stafford v. Till (d)*; or for goods sold on an executed contract, where the corporation is a trading one, *The City of London Gas Light Company v. Nicholls (e)*; but in all these cases the contract was executed. On an executory contract *The East London Waterworks Company v. Bailey (f)* is an express authority that a corporation cannot sue except the agreement be under seal. In *Dunston v. The Imperial Gas Light Company (g)*, Taunton J. appears to have thought that the only ground for a corporation being liable in assumpsit on an executed contract is moral obligation; and Parke J. asked pointedly whether there was any case in which a contract without seal by a corporation had been held a sufficient ground for an action. Assumpsit, therefore, not being maintainable on an executory contract, the first count is bad, and, as the damages are general, the judgment must be arrested, *Day v. Robinson (h)*: moreover, as the case comes from an inferior court, a *venire de novo* cannot be awarded; *Trevor v. Wall (i)*, *Bishop v. Kaye (k)*.

First point:
 The Court will
 not notice
 after verdict
 that the plain-
 tiffs are a cor-
 poration.

R. V. Richards, contra.—I. It is not averred on the record that the plaintiffs sue as a corporation, and there is nothing to shew they may not be a foreign corporation, who are entitled to sue on a parol contract; *Bank of St. Charles v.*

(a) 5 Taunt. 792.

(b) 5 B. & Ald. 204.

(c) 1 Campb. 466.

(d) 4 Bing. 74.

(e) 2 C. & P. 365.

(f) 4 Bing. 283.

(g) 3 B. & Ald. 125.

(h) 1 Ad. & E. 556.

(i) 1 T. R. 151.

(k) 3 B. & Ald. 505.

De Bernales(a), *The Dutch Company v. Von Moses*(b), *The British Linen Company v. Drummond*(c). The plaintiffs call themselves by a corporate name, but there is nothing to couple them with a company of the same name incorporated by act of parliament; if the objection had been taken at nisi prius the point would have arisen, but, after verdict, the Court will intend nothing to prejudice the verdict. The Court will not even take notice that Dublin is in Ireland; *Sprole v. Legge*(d), *Kearney v. King*(e). *Smith v. Smyth*(f) is a still stronger case, where the Court refused to take notice that London was not in Middlesex; and it appears by Lord *Coke*(g) that it is only of counties that the Courts will take judicial notice. So in *Rex v. Grup*(h), Lord *Holt* held, that though the Court could take judicial notice of counties they could not of towns. In *Fazakerly v. Wiltshire*(i) it was held, that the Court would take notice of the extent of ports. So in *The King v. Haddock*(k) it was held that the Court would take notice of the course of the Thames. But in *Rex v. Simpson*(l) they refused to notice that Colchester is in the diocese of London. It may be said that an act of parliament notices that the plaintiffs are a corporation, but there are numerous acts which shew that Dublin is in Ireland. After verdict, therefore, the Court will presume that all was proved which entitled the plaintiffs to recover, according to the cases of *Hitchins v. Stevens*(m), and the other cases collected in Serjeant *Williams's* note(n). *Barnett v. Glossop*(o) shews that where an agreement in writing is necessary, unless the objection be taken on the record, it is not available. *Tibbits v.*

1838.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

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| (a) 1 Ry. & Moo. 190. | (h) Comb. 460. |
| (b) 1 Stra. 612. | (i) 1 Str. 462. |
| (c) 10 B. & C. 903. | (k) Andrews, 137. |
| (d) 2 D. & R. 15; S. C. 1 B. & | (l) 2 Ld. Raym. 1379. |
| C. 16. | (m) 2 Show. 233; T. Ray. 457. |
| (e) 2 B. & Ald. 301. | (n) <i>Stennel v. Hogg</i> , 1 Wms. |
| (f) 10 Bing. 406. | Saund. 228 a n. (n 1) |
| (g) 2 Inst. 557. | (o) 1 Bing. N. C. 633. |

1838.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

Second point:
 After verdict
 it will be im-
 plied that the
 Corporation
 contracted by
 deed.

Yorke(a) is to the same effect, for the Court held there that a demand of the sum which the plaintiff claimed, if necessary to maintain the action, must after verdict be presumed to have been made.

II. Even if the Court recognize that the plaintiffs are a corporation, the objection made to their suing is too late after verdict. The cases that have been cited to shew that a corporation can only contract by deed, do not at all prove that they may not sue in assumpsit. The Court will intend, if a deed were necessary, that the corporation appointed an agent by deed, authorizing him to make contracts. In *Tilson v. The Warwick Gas Company* (b), the Court held, that even if a corporation could not contract by deed, the objection that there was no deed must be pointed out on special demurrer; and in *Yarborough v. The Bank of England*(c), which was trover against the Bank, the Court held that they would presume after verdict a deed by the Bank, authorizing their servant to commit the act in question. Or it may be assumed that a deed was granted by the corporation on one side, and a parol promise made by the plaintiffs in error on the other. There is no reason why there should be mutuality in the remedy. This appears proved by the *Mayor of Stafford v. Till*(d), for as the Court held there that a corporation might maintain assumpsit for use and occupation, and as no interest can pass from a corporation but by deed, it must have been implied that there was a deed from the corporation and a verbal promise by the defendant. [*Patteson J.* The action for use and occupation does not necessarily imply a contract, it may only be a waiver of a tort.] If the principle of the action is examined a contract must be implied. The corporation can only be entitled to sue on the contract, on the ground of some interest having passed from them, and as that requires a deed, in all the cases on exe-

(a) 5 N. & M. 609.


(c) 16 East, 6.

(b) 7 D. & R. 376; 4 B. & C.

(d) 4 Bing. 74.

cuted contracts, by and against corporations, a deed must have been implied. There is nothing in the law to shew that two parties may not contract, the one by deed, the other by parol. In *Co. Litt.* 229 a, it is said, "if the feoffor, donor, or lessor seal the part of the indenture belonging to the feoffee, &c. the indenture is good, albeit the feoffee never sealeth the counterpart belonging to the feoffor, &c." So in *Com. Dig. Fait* (A 2), "if an indenture be between A. of the one part, and B. and C. of the other, whereby A. demises to B. and C., who covenant with A. If B. seals the counterpart, but C. does not seal, yet if C. agreed to the lease, it shall be his deed, and he shall be bound by the covenants;" *Comyn* does not say how bound, but in *Foster v. Mapes*(a) the Court held, that covenant lay by the plaintiff on a deed indented, executed by the defendant, although the plaintiff had not delivered his part. These cases shew that even if a deed by the plaintiff be necessary the objection is too late after verdict. The point should have been raised by special demurrer. He also cited *Croydon Hospital v. Farley*(b).

III. But supposing the point may be taken now, as if it arose on special demurrer, the present action is maintainable. The contract made by the Company falls within the class of small and insignificant acts that a corporation may do without deed. If upon every contract for 1l. worth of gas a deed and stamp were necessary, the purposes for which the Company was incorporated could not be carried into effect. So far this case may be distinguished from *East London Waterworks Company v. Bailey*(c); the contract there was for a large amount, and one not likely to be of daily occurrence, and the dispute was, as to whether the contract was made or not. *Best* C. J. laid down some law in his judgment as to an executory contract, which was not necessary for the decision of the case, and which cannot be supported on legal prin-

1838.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

Third point:
 Assumpsit is
 maintainable
 by a corpora-
 tion on an
 executory con-
 tract.

(a) Cro. Eliz. 212.

(b) 6 Taunt. 467.

(c) 4 Bing. 283.

1838.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

ciples. There is no valid distinction between an executed and an executory contract. In a recent case, *The West Middlesex Waterworks Company v. Sewerkrop*(a), the Company sued on an executory contract, and no objection was taken. That was an action on the case, arising out of a contract, but the form of action is nothing; the question is, whether in cases of necessity like the present, a corporation may not make a simple contract. The numerous cases in which it has been held they may, are collected in *Vin. Abr. Corporation* (K 1 pl. 1 to 41); *Bac. Abr. Corporation* (E 3); *Bro. Abr. Corporations and Charities*, p. 184, pl. 47, 49, 50, 53. Then as to assumpsit lying, it is clear that if assumpsit lies against a corporation, it may also be maintained by them. *East India Company v. Tritton*(b) illustrates this, no objection having been made there to the company suing on bills of exchange; and *The City of London Gas Company v. Nicholls*(c) shews, that wherever a benefit has been derived by a party this action may be maintained against him. He also cited *Slark v. The Highgate Archway Company*(d), *Rex v. Bigg*(e), *Smith v. The Birmingham Gas Company*(f).

First point.

Gaselee, in reply. It is not necessary to discuss how much the Court will take notice of; for this corporation being erected by public statute, and having sued in their corporate name, as against them, the Court is bound to recognize the fact of their being a corporation. [Lord Denman C. J. We all think we are bound to take notice that the plaintiffs are a corporation.]

Second point.

Then as to what is to be intended after verdict. The rule is laid down by *Buller J.*, in *Spieres v. Parker*(g),—"Nothing is to be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated." How can the Court say that the fanciful cases put, of a deed having been made, &c. fall

(a) 1 Moo. & Mal. 408; 4 C. & P. 87.

(b) 3 B. & C. 280.

(c) 2 C. & P. 365.

(d) 5 Taunt. 792.

(e) 3 P. Wms. 419.

(f) 1 Ad. & E. 526.

(g) 1 T. R. 145.

1858.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

within this rule? It is said, for instance, that the Court may assume that there was a deed by the corporation, and a parol promise by the plaintiff in error; but the declaration avers mutual promises, and these, on the rule laid down by *Buller J.*, cannot be implied to be by deed. It was then said that the Court may assume the corporation appointed an agent by deed to make these contracts; but if the contracts are so necessary for the existence of the Company, why did they not appoint an agent?

Where assumpsit has been held maintainable by a cor- Third point.
 poration, it has always been on an executed contract; in which case *Best C. J.* grounds the action on the moral obligation which requires the corporation to pay or be paid for the benefit enjoyed. [*Coleridge J.* That only forms the consideration for the promise; there is as much a contract on an executed, as on an executory contract.] The distinction is, that in the former case there is a promise implied in law, but in the latter there must be a promise in fact. In *Mayor of Stafford v. Till (a)*, *Best C. J.* said—"Where a party has occupied land, the contract between him and the landlord must be considered as executed; so that there is no necessity for alleging in the declaration any express promise to pay." [*Coleridge J.* This then is the conclusion; that where a person has occupied land under a corporation, the law will imply a promise by him to pay, although the law would not allow of an express promise being made between them.] That is, apparently, the result of the cases; at all events it shews the difference that exists between an express promise and one implied by law. The decision in *The East London Waterworks Company v. Bailey (b)* decides this case, unless the Court is prepared to overrule it.

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This was error from a judgment pronounced

(a) 4 Bing. 75.

(b) 4 Bing. 283.

1838.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

in the Palace Court for the defendants in error, who were plaintiffs below in an action of assumpsit, on the breach of an executory contract, for the supply of gas on the one hand, and the non-acceptance and non-payment on the other. The error insisted upon in argument, before my brothers *Patteson*, *Coleridge* and myself, was, that the plaintiffs, being a corporation, were incapable of suing in assumpsit on an executory contract; and the distinction was taken between a contract executory and executed. In support of this distinction the case of *The East London Waterworks v. Bailey and others* (a) was cited as a direct authority. When this case was argued, this Court had not pronounced its judgment in that of *Beverley v. The Lincoln Gas Company* (b), in which it determined that assumpsit was maintainable against a corporation, upon an executed contract, for goods sold and delivered. We do not mention this latter case as directly in point, but because, having there considered at some length the principles upon which the law stands as to the powers and liabilities of corporations in respect of parol contracts, we are now relieved from some parts of the inquiry which it might otherwise have been necessary to have gone through.

Assuming it therefore to be now established in this Court that a corporation may sue or be sued in assumpsit, upon executed contracts of a certain kind, among which are included such as relate to the supply of articles essential to the purposes for which it is created, the first question will be, whether, as affecting this point and in respect of such contracts, there is any sound distinction between contracts executed or executory. Now the same contract which is executory to-day, may become executed to-morrow. If the breach of it in its latter state may be sued for, it can only be on the supposition that the party was competent to enter into in its former; and if the party were so competent, on what ground can it be said that the peculiar

(a) 4 Bing. 283.

(b) *Ante*, 1 N. & P. 283.

remedy which the law gives for the enforcement of such a contract may not be used for the purpose? It appears to us a legal solecism to say, that parties are competent by law to enter into a valid contract in a particular form, and that the appropriate legal remedies for the enforcement or on breach of such a contract, are not available between them. Where the action is brought for the breach of an executed contract, the evidence of the contract, if an express one, must be the same as if the action were brought while it was executory;—an oral or written agreement, or a series of letters, might be produced to prove the fact and the terms of the contract—could it be contended that these would be evidence of a valid contract after execution, but of a wholly inoperative one before? Unless positions such as these can be maintained, we do not see how to support any distinction between express executory and executed contracts, of the description now under consideration. A distinction, however, seems to be intimated in some cases between the express contract of the parties, and that which the law will imply for them, from an executed consideration; and a validity is attributed to the latter which is denied to the former. But there is no foundation for this: the difference between express and implied contracts is merely a difference in the mode of proof. On the one hand, a plaintiff, who should sue on a contract to be implied from certain acts done, must be nonsuited, if those acts were shewn to be in compliance with stipulations antecedently entered into, unless he was prepared with evidence of all the stipulations. On the other hand, no contract can be implied from the acts of parties, or result by law from benefits received, but such as the same parties were competent expressly to enter into. And this is important in the present argument, because it makes the decisions on implied contracts authority for our decision upon an express one. Upon these grounds we are prepared to decide that the present action was maintainable. So far therefore as the decision of the Court of Common

1838.


 CHURCH
 v.

 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

1838.

CHURCH
v.

IMPERIAL
GAS LIGHT
and COKE
COMPANY.

Pleas, in *The East London Waterworks Company v. Bailey and others* (a), proceeded on the distinction between contracts executed and executory, we are compelled, after consideration, to express our opinion that it was wrongly decided. The case may be sustained however on another ground, consistently with our previous remarks, and which affords another reason for our present decision. The general rule of law is, that a corporation contracts under its common seal—as a general rule, it is only in that way that a corporation can express its will or do any act. That general rule, however, has, from the earliest traceable periods, been subject to exceptions; the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience, amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed. Hence the retainer by parol of an inferior servant—the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal—are established exceptions. On the same principle stands the power of accepting bills of exchange and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon.


These principles were, it is evident, present to the attention of the Court of Common Pleas, when the case in question was decided; and they might reasonably have held, that a contract with a water company for the supply of iron pipes, was neither one of so frequent occurrence or small importance, or so brought within the purpose of the incorporation, that the principle of convenience above established required it to be taken out of the general rule.

(a) 4 Bing. 283.

If, however, the present case be tried by the same test, the decision ought to be the other way. On the face of this record we must understand this Company to have been incorporated for the purpose of supplying individuals, willing to contract with them for gas light and coke, and the present appears to have been a contract for the supply of gas for a year, amounting to 12*l.* 16*s.*, and so from year to year. We cannot be ignorant that such contracts must be of frequent and almost daily occurrence; and to hold that for every one of them, of the same or less amount, (for where the sum is so small, a diminution of half could not vary the principle,) it was necessary to affix the common seal, would be so seriously to impede the corporation in fulfilling the very purpose for which it was created, that we think we are bound to hold the case fairly brought within the principles of the established exceptions.

Leaving therefore the ancient rule still unbroken in all the instances to which it is fairly applicable, we are of opinion that the present action was well brought, and, consequently, our judgment will be for the defendants in error.

Judgment for the defendants in error.

1838.

 CHURCH
 v.
 IMPERIAL
 GAS LIGHT
 and COKE
 COMPANY.

TUFNELL, Clerk, v. CONSTABLE and BAILEY, Executors.

Tuesday,
 January 16th.

COVENANT on an indenture between *James Robinson*, deceased, of Wormingford, in the county of Essex, and the plaintiff, vicar of the same place. The declaration, after alleging that the plaintiff, at the time of making the indenture, &c., then was and still is the vicar of Wormingford, set out the following covenant by *James Robinson*:—The said *J.R.*, for his heirs, executors and administrators, did thereby covenant, promise and agree to and with the

A. by a voluntary conveyance covenanted that his executors should invest a certain sum in the three per cents, in the corporate name of the vicar of W., in the corpo-

rate names of the churchwardens of W., and in the corporate name of the archdeacon of C., in trust to pay 10*l.* per annum to the parish school, and the remainder in charities. In an action on the covenant against the executors, held on demurrer that there was nothing contrary to law in the covenant, nor did it appear to be impossible to be performed, although it may be questionable whether churchwardens are corporations except for particular parochial purposes. *Quare*, if a party covenants to do an impossible act, whether he is not liable in damages for his breach of covenant.

1838.

 TUFNELL
 v.
 CONSTABLE
 and another.

said vicar and his successors, that he, the said *J. R.* should and would in his lifetime, and within three calendar months next after the day of the date of the said indenture, or that out of his personal estate the executors or administrators of the said *J. R.* should and would, within six calendar months next after his decease, invest at interest in the 3*l.* per cent. Consolidated Bank Annuities, or in some other government or parliamentary stock or fund of Great Britain, being or producing perpetual annuities, and not in any annuities the time or duration of which is limited, and in the corporate name of the vicar of the vicarage or church of, and in the corporate names of the churchwardens of the parish of Wormingford aforesaid, and in the corporate name of the archdeacon of Colchester, in the said county, so much and such a sum of money as when so invested as aforesaid, and immediately after such investment, would produce by or in the yearly interest or dividend or dividends thereof the yearly sum of 35*l.*; such sum to be held, received and applied by the vicar and churchwardens for the time being, and the archdeacon of Colchester for the time being, upon trust to pay 10*l.* per annum towards the parish school, and upon the further trusts expressed in the deed.

Averments, that after the making of the bond *J. R.* died, and that thereupon the defendants became his executors, and that there came to their hands, as such executors, personal property of *J. R.* more than sufficient to perform and satisfy this covenant. Breach.

The defendant, after craving oyer of the deed, demurred generally. The deed appeared to be a voluntary conveyance of the sum mentioned in the declaration, upon the trusts to pay 10*l.* per annum to the then parish school, or such other school as the trustees should think fit; and upon the further trust to pay the further sum of 10*l.* towards the purchase of coals to be sold out again to the poor of Wormingford at such reduced price as the trustees should direct, and upon trust to pay all the remainder of the money in the purchase of blankets and winter clothing for the poor of Wormingford.

The marginal note to the defendant's demurrer was as follows : one ground of demurrer on which the defendants will rely is, that the covenant declared on is void, and was so at the time it was entered into, in consequence of the impossibility of performing it, being a covenant to invest money in the corporate name of certain corporations sole, who cannot by law take personal chattels in or by their corporate names, or in their corporate character or by perpetual succession ; and further, that churchwardens are not by law a corporation for the purpose of taking or holding the money covenanted to be invested, for which reasons, or one of them, no investment could, according to the intent and meaning of the deed, at any time be made by the testator, or by the defendants as his executors.

1838.

 TUFNELL
 v.
 CONSTABLE
 and another.

Channell, in support of the demurrer. The point sought to be established is, that the covenant declared upon is void, for the parties in whose corporate names the stock is directed to be invested have no corporate capacity for the purpose required, and therefore it is impossible to perform the covenant.

It is conceded that churchwardens are a corporation for certain purposes. As regards land, they are enabled by divers acts, as the 9 *Geo.* 1, c. 7, and the 59 *Geo.* 3, c. 12, with a view to the particular objects there specified, to purchase lands as a body corporate ; but they cannot purchase lands or take by grant without a special act of parliament. As regards personal property, they may in certain cases act as a corporation ; they may sue as a corporation for the goods of the church, and they may purchase goods for the use of the church, or the parish. But it is only in these and similar cases that they have any corporate existence : *Gibs. Cod.* 215 ; 1 *Burn's Eccl. Law*, Churchwardens, 408 ; 1 *Rol. Abr.* 395, pl. 1, and the cases collected in the note (n. 1) to 2 *Wms. Saund.* 47 c. In *Withnell v. Gartham* (a), where the corporate character of churchwardens was under discussion, Lord *Kenyon* C. J. laid down

(a) 6 T. R. 388.

1838.

 TUFNELL
 v.
 CONSTABLE
 and another.

expressly, that even for the particular purpose of taking care of the goods of the church, churchwardens "are only quâ a corporation." It is therefore submitted that they cannot, in their corporate character, take the stock in question, which cannot be considered as the property of the parish. In practice, it is well known that the Bank of England will not permit investments in the names of a corporation, unless a grant from the crown or act of parliament is produced, establishing the corporation. The covenant then seems one which it is impossible to carry into effect, and that without any default in the party covenanting; the case therefore falls within the distinction pointed out in *Paradine v. Jane(a)*, which was cited and recognized in *The Brecknock Company v. Pritchard(b)* and in *Atkinson v. Ritchie(c)*, and which lays down, that if a party takes a duty upon himself, he is bound to perform it, if he may. But if the covenant was impossible in law at the time it was made, the non-performance cannot be made the subject of suit. [Coleridge J. What impossibility is shewn here, to prevent the performance of this covenant?] The investment is directed to be made in the corporate names of certain parties. If, for the purpose required, these parties have no corporate existence, the law must recognize that fact; and the case is then the same as if the covenant required the investment to be made in the names of non-existent parties. Even if the bank were willing to permit such an investment as in point of form would satisfy the covenant, the transaction would, in point of law, be inoperative for the purpose required, viz. vesting the stock in certain corporations, so that their successors might take. Neither vicar nor archdeacon can take by succession. The covenant therefore being impossible in law, the cases upon bonds or feoffments with a condition, will strongly apply. A condition may be either precedent or subsequent. If there be a feoffment to be defeated by a condition subsequent, and that condition is impossible, the estate in the feoffee is held to be

(a) Aley, 26.

(b) 6 T. R. 750.

(c) 10 East, 530.

absolute and the condition void; *Co. Lit.* 206, b.; *Com. Dig.* Condition (D 1). So if a bond be conditioned to go from Westminster to Rome in three hours, the condition, being impossible, is held to be void, and the bond stands as a single bond; *Ib.* Other cases to this effect are in the books (a); and in *Shelley's* case (b) this point was recognized, "if a lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant, *quia impotentia excusat legem*." The law of this passage, as regards the particular point put, may be doubtful, but it is cited to shew that conditions and covenants have the like construction. Also in *Sheppard's Touchstone*, c. 7, p. 164, it is laid down, "if a thing to be done by a covenant be in the nature of it impossible, the covenant is void." The distinction is this, that where there is a bond subject to a condition, if the condition be impossible the bond stands as a single bond; but if the condition be incorporated with the obligation, the whole is void; *Pullerton v. Agnew* (c).

Thesiger, *contra*. Assuming the investment in question to be impossible, there is a broad distinction between a covenant voluntarily entered into, and a condition cast upon a party by act of law. In the latter case the law relieves him, if it is impossible to be performed; but in the former, the party is bound to perform, or to make amends in damages for, what he has covenanted to do. In this case there has been no change of circumstances; whatever impossibility exists, existed at the time the testator entered into the covenant. The distinction between a condition and a covenant is clear; if a feoffment be upon a condition precedent, the condition must be executed before the estate can vest, if it be subsequent, then if the condition be impossible, the estate having vested shall be absolute; *Co. Litt.* 206 b. But it is no answer to say that the covenant is impossible to be per-

1838.

 TUFNELL
 v.
 CONSTABLE
 and another.

(a) 1 Roll. Abr. Condition, 419, (b) 1 Rep. 98 a.
 420; *Com. Dig.* Condition (D 2). (c) 1 Salk. 172.

1838.

TUFNELL

v.

CONSTABLE
and another.

formed, for if a party covenant for the acts of a stranger, he must procure the stranger to perform those acts; *Doughty v. Neal* (a).

But how is this covenant impossible? it is true as to the vicar and archdeacon that these parties cannot take in succession, but they may take to themselves and their representatives: and as to the churchwardens, from the earliest times they have been considered a corporation for the purpose of taking chattels. It is no objection that this bequest may go to the vicar and archdeacon, and to the churchwardens, in different capacities, for they would take as tenants in common; *Co. Litt.* 190 a. It is quite immaterial to the defendants whether this money is afterwards transmitted to the heirs or to the successors of the parties named. No impossibility therefore is shewn, for it does not at all appear that the bank would refuse to invest in the mode prescribed. It is clear also that the vicar and archdeacon and their representatives could take under this covenant, for in *Co. Litt.* 46 b, it is laid down "if a lease for years be made to a bishop and his successors, yet his executors or administrators shall have it in *auter droit*, for regularly no chattel can go in succession in case of a sole corporation." *Co. Litt.* 9 a, *Fulwood's case* (b), and *Rennell v. Bishop of Lincoln* (c), confirm this point.

With regard to the churchwardens, they have always been held a corporation as to the goods of the parish. So far back as the Year Book, 8 *Edw.* 4, fo. 6, pl. 5, where trespass was brought by the churchwardens for a parish book, it was held that the writ was right in laying the trespass as a *damnum parochianum* for the goods of the parish; and so in 37 *Hen.* 6, p. 30, pl. 11, and *S. P. Bro. Abr.* Gardiens d'Eglise, fol. 7, pl. 4; *Bro. Abr.* Corporation, pl. 55, 73; *Fcoffment al une*, pl. 59. All these authorities shew that the bequest being of chattels, will pass to the churchwardens and their successors. But supposing that chattels would not go to a corporation sole, *Paice v. Archbishop of*

(a) 1 Wms. Saund. 214.

(b) 4 Rep. 64 b.

(c) 9 D. & R. 810; 7 B. & C.

113.

Canterbury (a) shews, that this being a charitable bequest, would form an exception; and *Mavor v. Nixon* (b) shews that whatever may be the rule of law a charitable bequest of chattels forms an exception.

1838.

 TUFNELL
 v.
 CONSTABLE
 and another.

Channell, in reply. It is not denied that a man who covenants for the acts of a stranger is as much bound as if he had covenanted for himself; but in either case, if the covenant has been always impossible in law, it is void. It is said, that even if the vicar and archdeacon cannot take for their successors, the bequest may go to their representatives. That however would not be a performance of the covenant which requires the investment to be in the corporate names of these three parties. It is conceded, that churchwardens may bring actions for the goods of a parish, and may perhaps take personal property bequeathed to the parish; but the present is not the case of a gift to the parish,—that is, to the body generally, so that the stock, &c. can be considered the property of the parish: it is merely a gift to trustees in part for charitable purposes, the objects of the bounty being required to be parishioners. The cases in the courts of equity only show that, with the consent of parties, a scheme will be framed for carrying a charitable bequest into effect.

LORD DENMAN C. J.—This is an action of covenant on an indenture, granted by a parishioner of Wormingford to the vicar of his parish, for the payment of a certain sum of money to be laid out upon the trusts enumerated in the deed. His executors have refused to perform this covenant, on the ground that it is impossible to do so. The covenant requires them to invest in the three per cents., in the corporate name of the vicar and in the corporate names of the churchwardens of Wormingford, and in the corporate name of the archdeacon of Colchester, and it is possible that the law may interfere to prevent the successors to some of these parties, in their corporate capacity, from taking this invest-

(a) 14 Ves. 364.

(b) 2 Y. & J. 60.

1838.



TURNELL

v.

CONSTABLE
and another.

ment in succession. But what difference does that make to the executors? It is nothing to them, and does not relieve them from the necessity of performing the obligation which the testator has covenanted to perform. It also appears that a charitable bequest forms one of the objects of the covenant, which would warrant an application to the Court of Chancery, and thereby all difficulties would be removed.

LITLEDALE J.—The defendants allege that they cannot invest this sum in the corporate names of these parties, because they are not corporations for this purpose. But let them try; let them apply to the bank. I do not mean to say that it would be a good answer to make, that the covenant was impossible to be performed, or that the bank had refused to invest in the mode covenanted for. But if it cannot be done, this should have been shewn; or the defendants might have applied to a court of equity to restrain the plaintiff from continuing the action; and that court could have carried the trusts into effect. But there is nothing contrary to law in the covenant, although these parties may not be corporations sole for this purpose. It therefore must be enforced like any other legal covenant.

WILLIAMS J.—I am of the same opinion. No change of circumstances has taken place here since the time the covenant was entered into. If an impossibility to comply with it ever existed, it existed then, and must be intended to have been known by the party entering into it. Again, it does not appear that the bank have ever refused to invest this money in the mode covenanted for; if they would not do so, it would be a defence valid or not, as the case might be; but nothing of the kind is set up here. On the contrary, nothing is shown to make out that these parties are not capable of taking under the words of the covenant, and nothing is suggested against the legality of the covenant.

COLERIDGE J.—This is a case in which a party has voluntarily entered into a covenant, and an action is now

brought to enforce it. The only answer capable of being given would be, that it was to perform a legal impossibility. I will not now inquire whether that would be a valid answer, but at present I do not see that any impossibility is made out. Each of the parties designated in the deed to take the money is a corporation, and it does not at all appear that the bank would refuse the investment of the money in their corporate capacity. The only question at present is, can the investment be made? There is no ground, nor ought we, to make the surmise that the bank will refuse. It ought to have been shewn, in order to complete this argument, that the bank are restricted by some act of parliament from receiving the investment in question. No impossibility therefore is shewn, or at all appears to exist, to prevent the performance of this covenant.

1838.

 TUFNELL
 v.
 CONSTABLE
 and another.

Judgment for the plaintiff.

WILKINS v. HEMSWORTH, Esq.

Tuesday,
 January 16th.

TRESPASS and false imprisonment against the defendant, a justice of the peace for the county of Norfolk. Plea, In an action of false imprisonment against a

justice of the peace, a special verdict found, that at a hearing before two magistrates, at which the plaintiff was summoned, two paper writings were made, signed and sealed by them, by the first of which he was adjudged to be the reputed father of a bastard child, and ordered to pay the expenses of the lying-in and order, and 1s. 6d. a week to the parish of B. so long as the child was chargeable; and S. A., the mother of the child, was ordered to pay 1s. a week in case she should not nurse the child herself. The second paper writing was exactly the same, except that S. A. was ordered to pay the 1s. 6d. a week, and not the plaintiff, the name of S. A. being inserted by mistake for the plaintiff's, and the justices believing that one order was a copy of the other. The justices also told the plaintiff at the time that he was to pay 1s. 6d. a week. When the two orders were made, they were delivered to the parish officers of B., according to the usual practice of the county, and they delivered the second mentioned instrument to the plaintiff, and kept the first themselves. On a demand of the arrears of 1s. 6d. a week, the plaintiff refused to pay, on the ground that the order delivered to him was not a good order. On a summons before the defendant, the parish officers of B. produced the order delivered to them; upon which the defendant committed the plaintiff to goal for three months, in default of his paying the arrears:—Held, that the order upon which the defendant issued his warrant was a valid order; that the defendant was not bound to go into the inquiry whether another order was made upon another person, a valid order being produced before him; and, per *Littledale J.*, that if two orders were made by mistake at the sitting of the magistrates, it was competent to them at the time to declare which was the right one.

2. A justice is liable in trespass, if he commit a person for disobedience to an order which turns out to be invalid.

1838.

 WILKINS
 v.
 HEMSWORTH.

not guilty. At the trial at the Norfolk summer assizes, 1835, before *Parke B.*, a special verdict was found, which stated the following, amongst other facts:—That on the 5th day of November, 1829, the plaintiff appeared before two justices for the county of Norfolk, on a charge of bastardy, in pursuance of a summons obtained by the churchwardens and overseers of the parish of New Buckenham, in that county, and thereupon the two justices made and wrote, and signed and sealed, two paper writings, one of which was as follows." The special verdict then set out an order, signed and sealed by such justices, by which the plaintiff was adjudged to be the reputed father of a bastard child, and ordered him to pay 15s. towards the lying-in of *Sarah Aldis* (the mother), 1*l.* 6*s.* 6*d.* for the order, and 1*s.* 6*d.* weekly to the churchwardens and overseers of New Buckenham, during so long time as the child should be chargeable. It further ordered *Sarah Aldis* to pay 1*s.* weekly to the churchwardens, in case she should not nurse the child herself. The other paper writing was also signed and sealed by the same justices, and was set out at length. After directing the plaintiff to pay the several sums of 15*s.* and 1*l.* 6*s.* 6*d.* as in the former order, it ordered *Sarah Aldis* to pay to the parish officers of New Buckenham 1*s.* 6*d.* weekly, during such time as the said child should be chargeable, and also ordered that the said *Sarah Aldis* should pay 1*s.* weekly in case she should not nurse the child herself. The verdict then found that the name of *Sarah Aldis*, in the clause ordering her to pay 1*s.* 6*d.* weekly, was written by mistake for that of the plaintiff, and that the justices, when they signed and sealed the last-mentioned order, believed and intended that it should be an exact copy of the first-mentioned order. The said justices, at the time they signed and sealed the above paper writings, told the plaintiff that he was to pay 1*s.* 6*d.* a week towards the support of the bastard child, and on having signed and sealed the same, they delivered them to the parish officers of New Buckenham, with directions to deliver one of them to the plaintiff, and to make demand of the money mentioned therein upon him,

1838.
WILKINS
v.
HEMSWORTH.

and to keep the other in the parish chest, and to make a memorandum upon that which they kept of the service of the other, according to the practice of the magistrates of that hundred, on occasion when orders and duplicate orders or copies have been made, it being left to the parish officers to keep one and deliver the other, without the magistrates specifying which was to be kept and which delivered. The parish officers kept the first-mentioned paper writing, and deposited it in the parish chest, and indorsed the service of the other upon it, and delivered the other to the plaintiff, who thereupon paid to them the sums of 1*l.* 6*s.* 6*d.* and 15*s.* The verdict then found, that the paper writing which was kept by the churchwardens was intended by the justices to be their original order, and that the paper writing delivered to the plaintiff by the parish officers was intended to be a copy thereof; that the said *S. Aldis* was present at the time the said instruments were signed, sealed and delivered; and that it did not appear which was made first, nor whether it was before or after they were made that the justices told the plaintiff that he was thenceforth to pay 1*s.* 6*d.* a week. The verdict then set out an application to the plaintiff, at the beginning of 1830, to pay the arrears of the weekly payment, which he refused to pay, on the ground that the order delivered to him was bad. The parish officers then informed him that the order kept by them, by their order, was the real order, and they served him with a copy of it. The plaintiff, having refused to pay, was in 1834 summoned before the defendant, a magistrate of the county. Upon depositions by the parish officers of the first-mentioned order, and of the plaintiff's non-compliance with it, and on being called upon to shew cause why he should not pay the arrears, he stated that the order delivered to him required the said *S. Aldis* to make the weekly payments. The defendant thereupon committed the plaintiff to Norwich gaol for three months, unless he should pay the arrears sooner. The jury assessed the plaintiff's damages at 20*l.*, in case it should appear to the Court, upon consideration of all the circumstances, that the defendant was guilty, &c.

1838.


 WILKINS
 v.

HEMDSWORTH.

Kelly, for the plaintiff. Although the justices had jurisdiction in this case to make one order, they have here made two, which are duplicate originals, and which must be taken together. But if they are taken together, they cannot be obeyed without striking out a material part of the order. Therefore the whole, being repugnant, is void: *Grant v. Fletcher (a)*. Supposing that one order were made before the other;—when once a good order is made, it is not competent to the magistrate to supersede it by making another. But in this case the jury have found they are duplicate originals: it is impossible to say which of them was first in order of time, for it is expressly so found in the special verdict; it is equally impossible to say which of them is binding. [*Coleridge J.* Are you not in this difficulty? If the order made upon the plaintiff was the first, then it is binding on him: if the order on the mother was made first, still there is a good order made upon the plaintiff. On what authority do you contend that the magistrates could make only one order?] The 18 *Eliz.* c. 2, s. 3, directs that the order shall be made on the father or mother; and it is quite clear (and indeed found by the jury), that the justices did not intend to make two orders in this case. If the two instruments form only one order, there is a fatal variance between them. If the Court should be of opinion that there is no variance, then the mother might be made liable for the arrears as well as the father. This case was before the Exchequer in *Wilkins v. Wright (b)*; and the ground taken by *Bayley B.* in his judgment, clearly shews that the two instruments delivered to the parish officers constitute but one order. The Court there relied on the fact that only one of the instruments was delivered to the parish officers, which they therefore said must be taken to be the valid order; but the jury have now found that both were delivered to the parish officers. It is certainly found in this case, that the order upon the plaintiff to pay the 1s. 6d. a week was intended to be the valid one; but it is quite contrary to the whole course of law that parol evidence

(a) 8 D. & R. 59; 5 B. & C. 436. (b) 2 C. & M. 191; 3 Tyr. 824.

should be admitted to explain the meaning of an instrument under hand and seal. The defendant therefore having acted upon an order which is a nullity, had no jurisdiction, and is liable in trespass.

1838.

 WILKINS
 v.
 HEMSWORTH.

B. Andrews, *contra*. The decision of the Court of Exchequer (a) is in favour of the defendant. The principal point here is, whether there has been a good and valid order against the plaintiff. It has been denied that the justices could make an order both on the father and on the mother. The words of the 18 *Eliz.* c. 3, certainly seem to point at its being made upon one of them only; but the constant practice has been to make the order upon both; and each of these orders would be bad if such a practice is contrary to law. The observation from the bench is decisive, that here there is a valid order against the plaintiff; and it is immaterial whether another order has been made against the mother: if that order is bad, it cannot be enforced against her. But there is nothing to shew that a subsequent order against the mother would be bad, or that an order made upon her at the same sittings, on a separate instrument, would be bad. Taking the two orders as one, all that it would amount to is, to make both father and mother liable to 1s. 6d. a week, and to repeat part of the order against the father. But such repetition does not vitiate an order. Therefore, whether there was one order or two, the order upon the plaintiff was valid. *Grant v. Fletcher* (b) is quite inapplicable; the entry in the broker's book not having been signed, it was necessary to refer to the bought and sold notes in order to ascertain the contract; and as they varied from each other in a material particular, there was of course no valid contract. Even if the order be bad, trespass does not lie against the defendant. The plaintiff's case was brought before him judicially: it was sworn that an order was duly made on the plaintiff, and he only acted on the complaint before him. [*Coleridge J.* Can you

(a) 2 C. & M. 191; 3 Tyr. 894. (b) 8 D. & R. 59; 5 B. & C. 436.

1838.

 WILKINS
 v.
 HEMSWORTH.

make that point, if the order is a nullity altogether? *Littledale J.* What authority have you for the position?]
Mills v. Collett (a) is relied upon. [*Williams J.* That is a very different case.]

Kelly, in reply. Supposing it to be competent to the justices to make two orders, it must be established that they did make two orders in this case; but there is nothing in the statute which justifies the opinion that they can make two orders. If they have power to make two orders, then the plaintiff would have to pay the money twice over; for directly the first is made, it is valid, and he would be obliged to pay the money under it. Then comes a second order, which, if good, he must also comply with. But it is clear, from the verdict, that only one was made, as it is stated that the justices intended the two instruments to correspond: the whole therefore must be taken together. *Weaver v. Price (b)* shews that trespass is maintainable if the justice acts without jurisdiction, although circumstances are stated to him on oath, which, if true, would be sufficient to give jurisdiction.

Lord DENMAN C. J.—There is no doubt in this case that, unless a good warrant is shewn for the imprisonment of the plaintiff, he is entitled to recover his damages. It appears that, on the hearing before the magistrates, an order is made upon him as the reputed father of a bastard child, and the order is delivered to the parish officers: another order is subsequently delivered to the plaintiff. When the parish officers afterwards summon him before the defendant, for not complying with the terms of the order, he denies his liability, on the ground that another party is liable. That would be good cause to shew before the magistrate, and a long inquiry might take place; in which case it would turn out that the order he relied upon was not the *valid* order. But I do not think the defendant was at all bound to go into that inquiry. A valid order is produced before

(a) 6 Bing. 85.

(b) 3 B. & Ad. 409.

him, and upon that he acts. For these reasons I think he was fully justified, and that judgment must be for the defendant.

1838.

 WILKINS
 v.
 HEMSWORTH.

LITLEDALE J.—I have had great doubts in my mind during the argument; and, though not upon the fullest conviction, I think upon the whole that judgment must be for the defendant. I think so upon this ground,—that the two instruments formed but one order. It does not appear which of these two orders was first made; but I think, as against the defendant, who has deprived the plaintiff of his liberty, we must take that upon the woman to have been the first. That order directs her to pay the weekly sum of 1s. 6d. Then another order is made upon the plaintiff to pay the same sum. All took place at one meeting; and there does not appear to me to have been any intention to make two orders. One order certainly differs from the other; but the magistrates told the plaintiff he was to pay 1s. 6d. a week. Therefore, even if the justices made a mistake in their first order, they were not *functi officio*; and all being done at the same meeting, it was competent to them to declare which was the right order.

WILLIAMS J.—I agree both with the view taken by my lord and that taken by my learned brother. I think there was nothing to shew that two orders were ever intended, and that it was enough to shew that the plaintiff had notice which order was the valid one. The decision come to on this point by the Court of Exchequer is perfectly satisfactory, namely, that the order delivered to the parish officers, and kept by them, was the valid one. I also think with my lord, that the defendant had before him a valid order, on which he was justified in issuing his warrant.

COLERIDGE J.—It is clear the plaintiff cannot succeed unless he makes out that the order in question was a nullity. Let us look then at the case. Suppose the magistrates make an order, by which the plaintiff is to pay 1s. 6d. a week, and *Sarah Aldis* 1s. a week, and that the plaintiff

1838.

WILKINS
v.

HEMSWORTH.

is summoned before a justice for non-payment under this order;—could he say then that that order was to go for nothing, because another order had been previously made by the justices, by which the woman was to pay a different sum? It clearly therefore was not a nullity.

Judgment for the defendant.

Wednesday,
January 17th.

THE QUEEN v. INHABITANTS OF WENDRON.

A bastard child, born before the passing of the 4 & 5 W. 4, c. 70, living apart from her mother who had married, and whose husband was alive, is removeable to the parish of her birth, although within the age of nurture.

ON an appeal against an order of two justices of the county of Cornwall, whereby *Sophia*, the illegitimate child of *Sophia Bowsarrick*, late *Sophia Hellings*, single woman, aged about four years, was removed to the parish of Constantine, in the same county, which came on to be heard at the Midsummer Sessions in 1836 for the same county, the Court quashed the order, subject to the opinion of this Court on a case which related these facts. The pauper, the said *Sophia Hellings*, is the illegitimate child of *Sophia Bowsarrick*, who, before her marriage, was a settled inhabitant of the parish of Constantine, and in which last-mentioned parish the said *Sophia Hellings*, the pauper, in the year 1832, was born. After her birth the pauper was placed at nurse in the parish of Wendron, in the said county, by and in which latter parish she was relieved and maintained as a pauper before and at the time the said order of removal was made. In the month of November, 1835, the pauper's mother intermarried with *John Bowsarrick* of the parish of Kenwyn, in the said county, and a settled inhabitant of that parish, and both she and her husband have resided in the said parish of Kenwyn ever since. The said *John Bowsarrick* and his wife, or either of them, never resided in the said parish of Wendron. And this Court are of opinion, that by virtue of the act of the 4 & 5 Will. 4, c. 76, the settlement of the pauper, the said *Sophia Hellings*, in the said parish of Constantine, was *suspended* during the lives of her said mother and her said husband, until she at-

tained the age of sixteen years, and that the pauper ought to have been sent to the residence of her mother.

1838.

The QUEEN
v.

Inhabitants of
WENDRON.

Sir *W. W. Follett* in support of the order of sessions. The question arises on the construction of s. 57 of the New Poor Law Act (4 & 5 Will. 4, c. 76.) As that section enacts, that the husband shall be liable to maintain the children of the wife born before marriage, and "that such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly," the sessions have considered that the child's settlement is suspended till the age of sixteen. The Poor Law Commissioners have arrived at the same conclusion. The other side contend, that the settlement-parish of the pauper may obtain an order upon the father-in-law for the relief of the child. But the statutes (a) which compel relations to contribute to the support of their families, merely enacts that they shall relieve them; this statute provides that the child shall be deemed part of the father-in-law's family. That enactment must be wholly senseless, if the father-in-law is only bound to contribute to the child's relief in the parish where it is settled. The meaning of the section is, that the child is to reside with the father, and if it becomes chargeable before the age of sixteen, it is the father's chargeability, not the child's. *Lang v. Spicer* (b) decided, that on the marriage of the mother of a bastard child, the putative father ceased to be liable, and that the father-in-law became chargeable in respect of it, but it does not touch the present question any more than *Rex v. Walthamstow* (c), because although the child cannot be removed to the father-in-law's parish, not being settled there, it does not follow that all the other incidents, of being part of the husband's family, do not accrue. Under the old law, a child under the age of nurture, like the pauper, could not be removed from the parents, and that law is unrepealed.

(a) 43 *Eliz.* c. 2, ss. 7, 11; 59
Geo. 3, c. 12, s. 26.

(b) 1 M. & W. 129.

(c) 1 N. & P. 460.

1838.
 The QUEEN
 v.
 Inhabitants of
 WENDRON.

Rowe, contra. This case does not raise the general question. This child was born in 1832, before the passing of the 4 & 5 *Will.* 4, c. 76, and therefore its settlement was in its birth-parish. It is admitted that if the child had been living with the mother, before that act passed, it would have been necessary to send the child with the mother to the mother's parish, even though the child had a different settlement-parish; *Rex v. Hemlington (a)*. [*Coleridge J.* Is not that only in case the child is not living at the place of its birth? There was a case in this Court of an Irish pauper, where the child was sent to its settlement-parish, and the parent was sent to Ireland (*b*).] That decision is founded on the statutes giving no power to remove any one to Ireland, having a settlement in this country. But in this case the child was not living with the mother, therefore the law as to the non-removal of a child within the age of nurture does not apply. It is laid down in the 4th *Burn's Justice (c)* "that if the mother voluntarily desert it (the child) the cause of nurture then ceaseth, and it may be sent to its birth-place of settlement." So that if the new act had not passed, it is clear that the child might be removed to its birth-place. All that the new act has done in this case, is to substitute the mother's parish for the birth-parish of a bastard (s. 71.) A conditional order cannot be made for a removal to the husband's parish (*d*); and the 13 & 14 *Car.* 2, c. 12, requires the removal to be to the last settlement. The child, therefore, may be removed to its birth-parish, and that parish may obtain an order upon the father-in-law for its support, or may proceed against him under 5 *Geo.* 4, c. 83, s. 3.

Lord DENMAN C. J.—The 57th section of 4 & 5 *Will.* 4, c. 76, may certainly be argued with much plausibility, to

(a) *Cald.* 6. And see *Skeffresh Town*, 5 N. & M. 581.
 v. *Walford*, 2 Bott, pl. 11.

(b) *Rex v. Bennett*, 2 B. & Ad.
 712, or *Rex v. Mile End Old*

(c) 4 *Burn J.* 430, ed. of D'Oy-
 ley and Williams.

(d) 2 *Nol. P. L.* 4th ed. 211.

make the bastard child of a female pauper part of the father-in-law's family for all purposes whatever; but considering that that act was passed principally for the relief of the poor, and not to effect changes in settlement, and more particularly when I find, that in s. 71 it is expressly enacted, that a bastard child shall follow its mother's settlement, I think it is a fair deduction, that if s. 57 intended to make any alteration in the law of settlement for such a child, when the mother married, that it would have done so in terms. The words of that section are, that the child shall become a part of the husband's family for *the purposes of the act*, which are, first, the receiving of maintenance, and, secondly, receiving it in such proportion as every other member of his family would be entitled to. In *Rex v. Walthamstow* (a) we held that the settlement of the child is not changed, but still the parish where the child is settled may come upon the husband and compel him to maintain it. Now, the parish of Wendron has nothing to do with this matter, the father and mother not living there; and their only obligation arising from the child being found in their parish, and being chargeable to them, it is clear that they cannot be liable. Then to what place can the child be removed, except to its settlement by birth? I therefore think the order of removal was right, and the order of quarter sessions wrong.

1837.

 The QUEEN
 v.
 Inhabitants of
 WENDRON.

LITLEDALE J.—The 57th section says, the child shall be part of the husband's family, but it does not say a word about settlement. There is no objection, therefore, to its being removed to Constantine, for it may still be considered as part of the husband's family, and an order may be made on him for its support. When the husband shall have provided for the maintenance of the child, he will have done all that is required by the act. The terms of s. 71 are different, for they are express as to the settlement of a bastard child, but the 57th section contains no provision on the subject.

(a) 1 N. & P. 460.

1838.

 The QUEEN
 v.
 Inhabitants of
 WENDRON.

WILLIAMS J.—The question as to the removeability of a child during the period of nurture, does not occur, because the child was living apart from its mother. The comparison of s. 57 with s. 71 goes far to show that the decision in *Rex v. Walthamstow* (a) was right, because all that is said in s. 57 is, that the child shall be deemed part of the husband's family, but s. 71 goes further, and enacts, that the child shall follow the mother's settlement. A strong inference arises from that provision, that s. 57 was not intended to alter the child's settlement in the cases provided for in that section. The child, therefore, is settled in its birth-parish, and I think that no suspension of its settlement should be considered to take place. If steps are to be taken against the father-in-law for contribution to the support of the child, it is highly reasonable that the parish where the settlement is, should be the parish to do so, and not the parish where the child may by accident happen to be.

COLERIDGE J.—I entirely concur. The tender age of the child is out of the question, because she is already living apart from her mother. *Lang v. Spicer* (b) only decided that the mother of a bastard child having married, the liability of the putative father ceased. Only three possible cases can be conceived with regard to this child. It must either remain at Wendron, or be removed to Kenwyn, or to Constantine. As to the first case, there is no provision of the act which enacts that the child shall have no settlement at all, or which makes it irremoveable from the parish where it happens to be till the age of sixteen. According to the terms of s. 57, the husband is bound to maintain the child; but if he refuse so to do,—why is a stranger parish, like Wendron, to bear the burden of putting that law in force? If it is to be removed to the husband's parish, a new form of order must be devised. It is admitted, that the child is not settled in that parish. But it is essential that the justices should adjudicate upon the settlement,

(a) 1 N. & P. 460.

(b) 1 M. & W. 129.

when an order of removal is to be made. I see no proviso in the act under which a removal could be made to any other than the settlement-parish. Then what is to prevent the removal being made to the settlement-parish? There are no words strong enough in the act to destroy that settlement. The literal meaning of the words in s. 57 does not warrant that construction, and on comparing it with s. 71, where there is an express provision on a correlative subject, no implication can be made that a similar provision was intended in the former clause. It is a much safer course to construe these sections according to the language used, and not to give them an extended sense, unwarranted by the words.

Order of Sessions quashed.

Order of Justices confirmed.

RICHARDS v. FRY.

Thursday,
January 18th.

TRESPASS for breaking and entering the plaintiff's close, and for chasing and worrying the plaintiff's sheep, being in and upon the said close, and driving them off the said close to certain places situate and being at a great distance from the said close of the plaintiff, and detaining them there.

The third plea was as follows:—And for a further plea as to the driving and chasing the sheep, ewes, and lambs, in the declaration mentioned, elsewhere than in the said closes of the plaintiff, as in the declaration mentioned; and as to the keeping and detaining the same, as in the declaration also mentioned, the defendant says that the plaintiff

1. To an action of trespass quare clausum fregit, and for chasing the plaintiff's sheep elsewhere than in the said closes, and detaining them for a long space of time, the defendant pleaded, as to the chasing the sheep elsewhere and detaining them,

that at the times when &c., he was in the lawful possession of a certain messuage &c., and prescribed for himself and the occupiers thereof for thirty years next before the several times when &c., to have common of pasture in the locus in quo, and then justified distraining the sheep damage feasant:—Held, that whether or not a defendant at common law could justify a trespass to personal chattels, by virtue of possession generally of the locus in quo, this plea was framed on the 2 & 3 W. 4, c. 71, and was bad on special demurrer for not alleging the user to have been for thirty years next before the commencement of the action.

2. *Semble*, per *Patteson J.*, that it is not necessary, in a plea under the 2 & 3 W. 4, c. 71, to allege the user to have been "without interruption."

1838.
RICHARDS
v.
FRY.

ought not to have &c., because he saith, that before and at the times respectively in the declaration mentioned, he the defendant was and still is in the lawful possession and the occupier of a certain messuage and lands, with the appurtenances, to wit, &c., situate and being in the county aforesaid; and that he the defendant, and all the occupiers for the time being of the said messuage and lands, with the appurtenances, for thirty years next before the said several times when &c., have actually, as of right, had and have been used and accustomed to have, and of right ought to have had, and the defendant then and still of right ought to have for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and lands, with the appurtenances, common of pasture in, upon, and throughout a certain place and lands in the county aforesaid, to wit, in the parish of Counterbury, in the said county, to wit, called or known by the name of Counterbury Common, for all his and their commonable cattle, levant and couchant, in and upon the said messuage and lands of the defendant, with the appurtenances, every year, and at all times of the year, as to the said messuage and lands of the defendant, with the appurtenances belonging and appertaining: and because the said sheep, ewes, and lambs, in the said declaration mentioned, were before and at the time of the commencement of the trespasses in the introduction of this plea mentioned, in and upon the said place or lands in this plea aforesaid, whereon the defendant is mentioned to have been, and to be entitled to common of pasture as aforesaid, depasturing and destroying the grass and herbage then there growing, and being and doing damage there, so that the defendant could not have or enjoy his said common of pasture there in so ample a manner as he then ought to have had and enjoyed the same, he the defendant, at the said time when &c., to wit, on the day and year aforesaid, seized and took the sheep, ewes, and lambs in the said declaration mentioned, as and for and in the name of a distress for the said damage, and was leading and driving, and led and

drove the same out of and from the said last-mentioned place and lands towards a certain common pound in the county aforesaid, to wit, in the parish aforesaid, there to impound and keep the said sheep, ewes, and lambs impounded according to law, for the cause aforesaid, until the defendant afterwards, to wit, on the day and year aforesaid, at the earnest entreaty of the plaintiff to the defendant, made not to impound the same, but to release and restore the same to him the plaintiff, released and restored the same to the plaintiff accordingly, as it was lawful for the defendant to do for the cause aforesaid, which are the same several trespasses in the introduction of this plea and in the declaration mentioned: and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him.

Special demurrer, shewing for cause that the said plea did not shew for how many years next before the commencement of this suit the defendant and the occupiers for the time being of the said messuage &c. had used the said common of pasture.

Joinder in demurrer.

Ogle, in support of the demurrer, in Michaelmas term last (a). This plea is framed on the 2 & 3 Will. 4, c. 71, ss. 1 & 4, but it is necessary in such a plea that the thirty years user should be alleged to be next before the commencement of the suit. All the pleas framed on this statute have so alleged it; *Monmouthshire Canal Company v. Harford* (b), *Tickle v. Brown* (c), *Wright v. Williams* (d). In *Jones v. Price* (e), where the allegation of user was for a period of thirty years before the commencement of this suit, *Tindal C. J.* held that it was necessary to support that allegation by proof of user for

1838.

RICHARDS
v.
FRY.

First point:
A plea on the 2 & 3 W. 4, c. 71, must allege the user to be next before the commencement of the suit.

(a) November 10th, before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) 1 C. M. & R. 614.

(c) 4 A. & E. 369.

(d) 1 M. & W. 77.

(e) 3 Bing. N. C. 52.

1838.

RICHARDS

v.

FRY.

Second point:
The plea must
allege the user
to be without
interruption.

thirty years next before the suit. *Beasley v. Clarke* (a) is another decision on this statute. II. This plea does not state the user to have been without interruption. Sections 1 & 4 shew that the right must be enjoyed without interruption for thirty years, and all the pleas on the statute have alleged the user to be without interruption. [*Patteson*, J. It has been held, that where the user has been alleged to be as "of right," interruptions may be shewn (b); and if so, the present form is good.] There is no decision that a plea without this allegation is good. The question could not arise in *Tickle v. Brown* (b), because there the user was alleged to be without interruption (c).

Third point:
A plea of justification to
trespass to
personal chattels may allege
possession by
the defendant
generally.

M. Smith contra. The declaration complains of breaking the plaintiff's close and driving his sheep, but the plea only justifies the latter. The question, therefore, on the 2 & 3 Will. 4, does not arise. For the justification being to personal chattels only, it is sufficient to allege the defendant's possession generally; *Anonymous* (d). Lord Holt C. J. in that case said, "Where the action is transitory, as trespass for taking goods, the plaintiff is foreclosed to pretend a right to the place; nor can it be contested upon the evidence who had the right; therefore possession is justification enough: but in trespass quare clausum fregit it is otherwise." This dictum was disapproved of in *Taylor v. Eastwood* (e), but the decision was upheld. The case in *Salk.* is cited by Serjt. *Williams* (f), to shew that in trespass for chasing the plaintiff's cattle, possession is a sufficient justification. In actions for disturbance of the plaintiff's common, it is sufficient to aver possession generally; *Com. Dig.* Pleader (C 39); and there is no distinction in principle between such an action by a plaintiff, and a jus-

(a) 2 Bing. N. C. 705.

to notice.

(b) *Tickle v. Brown*, 4 A. & E. 369.

(d) 2 Salk. 643.

(e) 1 East, 212.

(c) *Ogle* took another objection to the plea, which the decision of the Court renders it unnecessary(f) Note 1, to *Stennel v. Hogg*, 1 Wms. Saund. 221.

tification by a defendant for taking cattle damage feasant in a place of which he is possessed. The rule is broadly laid down by Serjt. *Williams* (a), that when the right of common is only inducement, it is sufficient for the defendant to allege that he is possessed. [*Patteson* J. You say that your plea is a good plea at common law, but in form it certainly is a plea under the statute.] If the allegation as to the thirty years user be struck out, then it amounts to a plea of possession at common law; and if not quite correct in form, still no objection has been taken to it on special demurrer. In *Bright v. Walker* (b), the declaration averred that the plaintiff was possessed of a certain wharf, and by reason thereof ought to have had, and still of right ought to have a right of way; it was objected that the right of way was improperly laid as appurtenant to the wharf; but *Parke* B. said, "There is no difficulty about the declaration; that is sufficient." So in *Atkinson v. Teusdale* (c), a right of common was averred in the same way.

1838.

 RICHARDS
 v.
 FRY.

II. The plea is good on the statute. The object of the act is to be gathered from the preamble, namely, that it was to substitute a definite period of time for the "time immemorial" formerly used in pleas of prescription. Then as sect. 5 shews that the allegation of the time fixed by the statute is to be substituted for the "time immemorial," it follows that the new prescription is to be brought down to the period to which the time immemorial used to be, namely, to the period of the trespass committed. Section 4, which enacts that the period shall be taken to be that next before some suit or action wherein the claim or matter to which such period may relate shall have been brought in question, relates only to the mode of proof, and this is shewn conclusively by *Jones v. Price* (d). If that section is to be followed literally in pleading, the plea must allege a user for thirty years next before a suit wherein the claim had been

(a) Note (2) to *Mellor v. Spate-*
man, 1 Wms. Saund. 346.

(b) 1 C. M. & R. 211.

(c) 3 Wils. 78.

(d) 3 Bing. N. C. 52.

1838.

RICHARDS

2.

FRY.

brought in question. But suppose a party had a right three years ago, which he released, and then that an action was brought against him for a trespass committed before the release, if he pleads according to the letter of the statute, i. e. a user for thirty years before the commencement of the suit, he would be defeated, although the act in question was perfectly justifiable at the time. [*Patteson J.* He might not be able to avail himself of the statute, but he would have a defence at common law.] That may be, but the case shews that such a harsh construction of the statute was never intended. *Wright v. Williams* (a) only decided that an allegation of user next before the commencement of the suit was good; it is consistent with that case, that the allegation in this plea is good also.

Second point. III. As to the omission of the words "without interruption," the rule in pleading is, that it is not necessary to aver any thing which more properly comes from the other side. If there had been interruptions, it might have been shewn by the other side. *Parke B.*, in giving judgment in *Bright v. Walker* (b), said that enjoyment must have been "without interruption;" but his lordship was clearly only speaking of the evidence necessary to be brought forward.

Third point. *Ogle* in reply. If a defendant justifies under a right of common, he must set out his title specially. The rule is thus stated by *Serjt. Williams* (c), "in a plea justifying under a right of common, the defendant must set out his title to the common specially." [*Patteson J.* *Serjt. Williams* is there clearly speaking of actions quare clausum fregit. *Mr. Smith* draws a distinction between that action and trespass to personal chattels.] The arguments drawn from the inconvenience of construing the 2 & 3 *Will.* 4, c. 71, s. 4, according to its terms, were urged in *Wright v. Williams* (a), but without effect. The allegation "without

Second point. interruption" ought to have been made, for it forms part of

(a) 1 M. & W. 77.

(b) 1 C. M. & R. 311.

(c) Note 2, to *Mellor v. Spate-man*, 1 Wms. Saund. 346.

the defendant's justification. A traverse of the allegation "as of right" would not have been sufficient. In *Beasley v. Clarke* (a), where there was a traverse of the user as of right, and evidence was admitted that the user had been by leave and licence, the claim of user was laid as of right and without interruption. [*Patteson J.* How could the allegation "without interruption" be traversed? if it had been alleged, it would not have done to aver interruptions generally.]

1838.

 RICHARDS
 v.
 FRY.

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—The declaration in this case stated that the defendant broke and entered the plaintiff's closes by name and abutments, and chased and drove away the plaintiff's sheep from and out of the said closes to places at a great distance, and there kept them, and afterwards drove and chased the sheep away from the last-mentioned places to other places at a greater distance. The defendant pleaded, first, not guilty; secondly, that the closes were not the plaintiff's; thirdly, as to driving and chasing the sheep elsewhere than in the plaintiff's closes, that the defendant was possessed of a messuage and lands, and that all the occupiers for the time being of the said messuage and lands, for thirty years next before the said several times when &c., have actually as of right had and have been used and accustomed, and of right ought to have had, and the said defendant then and still of right ought to have common of pasture in a certain common, as to the said messuage and lands belonging and appertaining. The plea then justifies driving and chasing the plaintiff's sheep from that common as disturbing the defendant's right.

To this third plea the plaintiff has demurred, assigning for cause that it does not appear by the plea for how many years next before the commencement of this suit the defendant and the occupiers of his messuage and lands have

1838.

RICHARDS

v.

FAY.

Third point.

had common. The objection arises on the statute 2 & 3 Will. 4, c. 71, ss. 1, 4 & 5. The defendant's counsel, however, endeavoured to avoid the objection by arguing that this plea may be supported at common law without any reference to that statute; that it is in substance an allegation that the defendant is possessed of a messuage and lands, by reason whereof he is entitled to right of common, and that he drove away the plaintiff's sheep, who were disturbing that right, and that such allegation is sufficient in a plea to a transitory action for chasing sheep, without claiming the right of common by prescription in a *que* estate, inasmuch as that right is in this case only inducement or conveyance. He relies on the cases which establish that such an allegation is sufficient in a declaration for disturbance of common, and on the analogy to a plea justifying the taking of cattle damage feasant, in which it is sufficient to allege the defendant's possession of the *place* where the cattle are taken. We have not found any case in which the principle established in those cases, viz. that as against a wrong-doer, it is sufficient to allege possession, has been applied to a plea stating a right of common. A note of Mr. Serjt. Williams, in the case of *Mellor v. Spate-man* (a), was referred to, in which he so lays down the rule in these words:—"Indeed, where the right of common is only inducement or conveyance, it is held sufficient for the defendant to allege that he is *possessed*; as where the justification is an escape of the cattle from a common to the close in which &c., through defect of a fence, which the plaintiff is bound to repair, or an escape from the defendant's own close." But the authority he cites, viz. *Faldo v. Ridge* (b), supports only the latter part of the sentence. The point may be doubtful, but we think we are not called upon to determine it; for on attentively considering this plea, we cannot treat it as averring only possession of a right of common, but are satisfied that it avers a right of common in a *que* estate, substituting for time immemorial

(a) 1 Wms. Saund. 346.

(b) Yelv. 75.

thirty years under the late statute. *Dorne v. Cashford* (a) is an express authority to shew that a bad averment of a right in a *que* estate in a declaration, cannot be treated as an averment of possession only, though such an averment, properly framed, would have been sufficient in the case.

1838.

 RICHARDS
 v.
 FRY.

We come, therefore, to the principal objection, viz. that the thirty years are laid "next before the said times when &c.," instead of "next before the commencement of this suit." The first section of 2 & 3 Will. 4, c. 71, enacts that no claim to right of common, which shall have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of thirty years, shall be defeated by showing only that it was first taken at a prior time.

The fourth section enacts, that the thirty years shall be deemed and taken to be the period next before some suit or action wherein the claim shall be brought into question.

The fifth section enacts, that in all pleadings in trespass it shall be sufficient to allege that enjoyment of common as of right by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in the act as may be applicable to the cases, and without claiming in the name or right of the owner of the fee, as is now usually done.

Taking these sections together, it seems quite clear that the averment of enjoyment for thirty years next before the times when &c., is not in conformity with the act. The period mentioned in the act is plainly thirty years next before some suit or action in which the claim shall be brought into question. Generally speaking, that would be next before the commencement of the suit in which the pleading takes place; and, at all events, it is not next before the times when &c.

But we were pressed with absurdities and inconveniences, which it is supposed would arise from such construction of the act; and, on the other hand, difficulties of the same

(a) 1 Salk. 363, & C. 1 Com. Rep. 44.

1838.

RICHARDS

v.

FRY.

nature were pointed out, to which we should give occasion by holding the plea to be good.

These absurdities and inconveniences were urged to the Court of Exchequer in *Wright v. Williams* (a), in which the averment was "next before the commencement of this suit;" but that Court held the averment to be correct, and the decision is directly in point; for we cannot think, as was suggested at the bar, that both modes of averment are correct, and either may be adopted, at the option of the pleader.

The periods in the two averments are certainly quite different, and the evidence requisite to support them manifestly not the same.

We shall not attempt to obviate the difficulties suggested, but adhering to the express words of the statute, and to the decision in *Wright v. Williams* (a), with which we fully agree, we hold that the only correct averment is "next before the commencement of this (or, possibly, some other) suit."

We do not feel that the case of *Jones v. Price* (b) at all militates against this decision. That case merely establishes that the averment of "thirty years before the commencement of the suit," means "thirty years *next* before the commencement of the suit;" in other terms, that the omission of the word "next" does not alter the sense. Other objections were taken by the counsel for the plaintiff to the plea in question, which it becomes unnecessary for us to notice.

For the reasons above stated, we think that the plea is bad, and that judgment must be given for the plaintiff.

Judgment for the plaintiff.

(a) 1 M. & W. 77.

(b) 3 Bing. N. C. 52.



1838.



The QUEEN *v.* The POOR LAW COMMISSIONERS.—In the matter of the HOLBORN UNION.

Thursday,
January 18th.

SIR F. POLLOCK, in Michaelmas term, had obtained a rule nisi for a certiorari, calling upon the Poor Law Commissioners to shew cause why an order of theirs, dated March 29, 1836, whereby they ordered the parish of St. Andrew, Holborn-above-Bars, united with the parish of St. George the Martyr, and the liberty of Saffron Hill, Hatton Garden, Ely Rents, and Ely Place, to be united for the relief of the poor, by the name of the Holborn Union, and that a board of guardians, to the number of twenty, should be elected according to the provisions of the Poor Law Amendment Act. The notice sent in pursuance of the 4 & 5 Will. 4, c. 76, s. 106, stated the three following grounds for the application to this Court; first, that the parishes of St. Andrew, Holborn-above-Bars, and St. George the Martyr, were a union at the time of making the order, and the administration of the poor laws was vested in a board of governors and directors, elected under 6 Geo. 4, c. clxxv. (local), and that the Poor Law Commissioners have not obtained the consent in writing of two-thirds of the governors and directors for the time being, as required by s. 32 of 4 & 5 Will. 4, c. 76; secondly, that there being a board of governors and directors acting under 6 Geo. 4, c. clxxv., in whom the administration of the poor laws for the united parishes of St. Andrew, Holborn, and St. George the Martyr was vested, the Poor Law Commissioners had no authority to interfere with the local government of the said united parishes; thirdly, that the Poor Law Commissioners had ordered a board of guardians, to consist of twenty, to be elected, by which order the number of guardians was decreased, without having obtained the consent of the

The parish of St. G. was created, under the 10 Anne, c. 11, a parish for ecclesiastical purposes only, but for the relief of the poor and other parochial purposes it continued to form part of the parish of St. A., from which it had been severed. In various local acts respecting these parishes, they were spoken of as united parishes, and at the passing of the Poor Law Amendment Act, the laws for the administration of relief to the poor were vested in a board of fifty guardians elected from the two parishes jointly; but neither of these parishes had ever maintained their poor separately:—Held, that these parishes were not a union incorporated for the relief of the poor under any local act, and, therefore, that the Poor Law Commissioners might join them to a union under s. 26 of the Poor Law Amendment Act, without the consent of two-thirds of the existing guardians, as required in certain cases by s. 32.

1838.

 The QUEEN
 v.
 The POOR
 LAW COMMIS-
 SIONERS.

owners of property and rate-payers to such alteration, contrary to s. 41 of 4 & 5 *Will.* 4, c. 76.

The affidavits, on which the rule was obtained, stated, that the parishes of St. Andrew, Holborn-above-Bars, and St. George the Martyr, had been, since 1825, governed by a board of guardians and directors, appointed under 6 *Geo.* 4, c. clxxv., consisting of fifty guardians.

The affidavits in answer stated, that the district now forming the parish of St. George the Martyr, was formerly part and parcel of the parish of St. Andrew, Holborn-above-Bars, and that it was separated from that parish for ecclesiastical purposes only, in 1713, under the 10 *Anne*, c. 11, but that for all other purposes it never had been separated; and that, for the relief of the poor and all other parochial purposes, the two parishes continued united, having one work-house and one set of overseers, and that the parishioners of the two parishes were rated under one rate for the relief of the poor. It was also sworn, that by researches into ancient documents, it appeared, that formerly the parish of St. Andrew, Holborn, formed one entire parish, and that under the 13 & 14 *Car.* 2, c. 12, the parish of St. Andrew, Holborn, for the more convenient relief of the poor therein, was divided into three townships or liberties, which were called the upper and lower liberties in the county of Middlesex, and the city liberty, all three of which supported their own poor separately. The commissioners, under 10 *Anne*, carved out of the upper liberty of the parish of St. Andrew, Holborn, a parish called St. George the Martyr, but only for ecclesiastical purposes. It was also sworn, that this district was sometimes called by the name of the Upper Liberty of St. Andrew, and sometimes the united parishes of St. Andrew and St. George.

Sir *J. Campbell* A. G., Sir *W. W. Follett*, *Wightman*, and *Tomlinson*, now shewed cause. It will be contended, that the parishes of St. George the Martyr and St. Andrew, Holborn, are a union already; and, therefore, that the Poor

Law Commissioners cannot interfere with them, except in the mode pointed out by s. 32 of the Poor Law Amendment Act. But St. George the Martyr is not a parish, except for ecclesiastical purposes; for the relief of the poor and other parochial objects, it constitutes part of the parish of St. Andrew, Holborn-above-Bars. The interpretation clause (s. 109) defines a parish to mean any place "maintaining its own poor;" therefore St. George's does not come within the definition, and it follows that no union exists, according to the meaning affixed to that word in the interpretation clause. S. 32 is relied upon by the other side; and it is contended, that as St. George's and St. Andrew-above-Bars are united for the purposes of rating, they formed a union before the passing of the Poor Law Amendment Act. But these parishes never having been separated, cannot be said to be united for the purposes of rating. S. 109 comprehends three classes under the term "union;" first, parishes united under the Poor Law Amendment Act; second, parishes incorporated under *Gilbert's Act* (a); and third, parishes incorporated for the relief of the poor under any local act. This case can only come within the third class; but to make a union of parishes, there must be previously existing districts or places maintaining their own poor. The facts stated in the affidavits dispose of the case, for they shew no such parishes or districts existed here. First of all, St. Andrew, Holborn, is a parish for all purposes whatsoever. Then by the 13 & 14 *Car. 2*, this parish was divided into three liberties, for the purpose of maintaining their own poor. One of these liberties was called the Upper Liberty. Under the 10 *Anne*, c. 11, a parish for ecclesiastical purposes only was carved out of the Upper Liberty, the remainder of which was called St. Andrew-above-Bars. Under s. 22 of 10 *Anne*, St. George the Martyr might have been made a separate parish for all purposes; but that section has never been acted upon, and the two districts for

1838.

 The QUEEN
 v.
 The POOR
 LAW COMMISSIONERS.

(a) 22 *Geo. 3*, c. 83.

1838.

 The QUEEN
 v.
 The POOR
 LAW COMMISSIONERS.

the relief of the poor and other parochial purposes, continued to be one parish, according to s. 23 of that act. The 6 Geo. 3, c. 100, and various local acts (*b*), have been passed, regulating the laws for the administration of the poor in these parishes, but as they never were separated for that purpose, no local act can be said to have united them. The present case was in some degree anticipated in the case of *Rex v. The Poor Law Commissioners* (*a*). Lord Denman C. J. there stated the question to be, "whether the Commissioners are prevented from including in a union or parish, a place which is already governed by a local act." The sole question, therefore, is, whether the parishes form a union within the provisions of the Poor Law Amendment Act.

Sir *F. Pollock, Erle, Busby, and Thomas*, contrà. The two parishes of St. George the Martyr and St. Andrew, Holborn-above-Bars, have been two separate parishes ever since the 10 Anne, c. 11. Then, having been united under 6 Geo. 3, c. 100, for the purposes of rating, they form a union within the meaning of s. 32, and can only be dissolved, or have their constitution altered by the consent of two-thirds of the guardians of the existing board. The legislature has always recognized these parishes as united (*b*).

(*a*) 2 N & P. 8.

(*b*) The following local acts were also cited.

The 6 G. 3, c. c. (local), intituled "An Act for employing the Poor, and Lighting &c. the Streets within that Part of the Parish of St. Andrew, Holborn, which lies above the Bars, and the Parish of St. George the Martyr."

S. 1 enacted, that the inhabitants within the said part of St. Andrew, together with the inhabitants of the parish of St. George

the Martyr, should meet annually, and elect fifty inhabitants (of the two districts) as governors and directors of the poor.

The 6 Geo. 4, c. clxxv. (local) intituled, "An Act for the better regulating, charging, and collecting of the Rates for the Relief of the Poor, within that Part of the Parish of St. Andrew, Holborn, which lies above the Bars, in the County of Middlesex, and the Parish of St. George the Martyr, in the said County, for the better Mainte-

Thus, in the 10 *Geo.* 4, c. xxxii. (local), the preamble recites the litigation which had taken place between the Society of Lincoln's Inn and the governors and directors of the poor of the said part of the parish of St. Andrew, Holborn, and the parish of St. George the Martyr, (such last-mentioned parish having long since been united with the said part of the said parish of St. Andrew, Holborn, for the purpose of relieving the poor and some other parochial purposes); and a series of local acts, the 11 *Geo.* 3, c. xxii., the 14 *Geo.* 3, c. xc., the 39 *Geo.* 3, c. xxxix., and the 6 *Geo.* 4, c. clxxv., all recognize these parishes as united. The Poor Law Commissioners themselves, in the order they have made, describe these parishes as St. Andrew, Holborn-above-Bars, united with St. George the Martyr. These parishes, therefore, are to all intents a union; and although the definition of *union* is given in s. 109, that was not intended to narrow, but to extend the signification given to the term; and other meanings of the term which had been previously given by the legislature, were not intended to be excluded. It is only in fact upon the researches occasioned by this motion, that the Commissioners have ascertained the history of these parishes, for it is clear they were not aware of it at the time they made their order. In their opinion, therefore, as in that of the legislature, and of all the world, these parishes formed a union. This

1838.

 The QUEEN
 v.
 The POOR
 LAW COMMISSIONERS.

nance, Employment, and Regulation of the Poor thereof; and for regulating the Nightly Watch thereof."

S. 1 recited the prior local act of 39 *Geo.* 3, and repealed it.

S. 5 provided for an annual meeting of the inhabitants of the two districts for the election of fifty governors and directors of the poor.

The 10 *Geo.* 4, c. xxxii. intitled "An Act for confirming an Agreement between the Treasurer and

Masters of Lincoln's Inn, and the Governors and Directors of the Poor of the *United Parishes* of St. Andrew, Holborn-above-the-Bars, and St. George the Martyr, Middlesex."

The preamble to this act recited, that the parish of St. George the Martyr had been long since *united* with the said part of the said parish of St. Andrew, Holborn, for the purpose of relieving the poor and some other parochial purposes.

1838.
 The QUEEN
 v.
 The POOR
 LAW COMMISSIONERS.

Court has already, in the case of the *Whitechapel Union* (a), recognized the intention of the legislature to make distinction between populous and small parishes, in the mode of applying the act; and in the former case of *Rex v. The Poor Law Commissioners* (b), *Patteson J.* pointed out, that it was the intention of the legislature to make use of all existing boards of guardians and directors. *Lord Denman* also dwelt on the express enactments to be found in the act for the preservation of existing institutions. It is said these parishes are only divided for ecclesiastical purposes; but a parish, as defined by *Johnson*, is, "the particular charge of a secular priest;" and it is not contended that they are two parishes for the purposes of settlement. These two parishes, therefore, are parishes within the meaning of the act, and they form a union within the meaning of the act. Accordingly, to make a change in their constitution, the consent of two-thirds of the guardians of the existing board must be previously obtained.

LORD DENMAN C. J.—This is an application for a certiorari to bring up an order made by the Poor Law Commissioners for uniting St. Andrew, Holborn-above-Bars, and St. George the Martyr, with the liberty of Saffron Hill, Hatton Garden, Ely Rents, and Ely Place. This order purports to be made under s. 26 of 4 & 5 Will. 4, c. 76. It is alleged, however, that the district affected by the order comes within the exception contained in s. 32, and that therefore no dissolution, or alteration of it, or addition thereto, shall take place, unless a majority of not less than two-thirds of the guardians concur; for that, by several local acts, the two portions of the district are treated by the legislature as a union; that the term *union* is constantly applied to them, and therefore that it comes within the clause in question. We have already come to two decisions upon this act, which it is alleged apply to the present case. But,

(a) 9 N. & P. 8.

(b) 1 N. & P. 392.

in my opinion, they do not. In the first case (*a*), we held, that the act did not apply to a single parish with a local board of guardians. If this entire district, therefore, comprehended in the Commissioners' order, has not a local board of guardians, the decision referred to does not touch the present question. It is then said, that it appears by our judgment in the second case (*b*), that we recognized a difference of intention in the legislature, between the proceedings to be applied to populous or small districts, and that, as these districts are large and populous, we should now act upon this distinction. It is true we did there observe upon the reasons which might have induced the legislature to exempt a parish having a board of guardians from the clause giving the Commissioners power to make unions; but we entirely disclaim any right to give to the words of the legislature a meaning different from their natural import, in order to make them accord with some latent intention that may be supposed to have existed. In acts of general bearing like these, it is absolutely necessary to construe words according to their obvious meaning, and not to take the unwarrantable liberty of attributing a sense to plain words different from their natural import.

Another argument has been urged, that parliament wished to interfere as little as possible with existing institutions. This we do not deny, and we acted upon it in the first case already noticed, (*a*) but this consideration renders it imperative upon us to see what was the existing state of things in the parish at the time the order was made. Now to see whether there was a union existing here within the meaning of this act, we must look at s. 109, (the interpretation clause) to ascertain the import of the word *union*. We there find that it is to include any number of parishes united either under that act, or under *Gilbert's* act, neither of which is the case here; or thirdly, any parishes incor-

1838.
The QUEEN
v.
The POOR
LAW COMMISSIONERS.

(*a*) *Rex v. The Poor Law Commissioners*, 1 N. & P. 371.

(*b*) *Rex v. The Poor Law Commissioners*, 2 N. & P. 8.

1838.

 The QUEEN
 v.
 The POOR
 LAW COMMISSIONERS.

porated for the relief or maintenance of the poor under any local act. Does this district come within the third category? Are these parishes incorporated under any local act? To ascertain that, we must see what the legislature means by the word *parish*. By the same clause, parish is construed to be parish, city, district, and other place, or division or district of a place maintaining its own poor. It is clear that neither of these places is a parish in any other sense, and so far from either of them being a parish maintaining its own poor, each is a mere division of a larger parish. They have been divided, it is true, for ecclesiastical purposes, but neither of them has ever been called upon to maintain its own poor. I therefore think that the exception in s. 32 does not apply, and accordingly that a certiorari ought not to be granted.

LITLEDALE J.—I think there is no ground for this application. It appears that, prior to the 13 & 14 *Car.* 2, c. 12, the parish of St. Andrew, Holborn, was one entire parish maintaining its own poor. Under that act the parish was divided into three liberties, which were equivalent to townships, for the purpose of maintaining their respective poor. Then, under the 10 *Anne*, c. 11, a power is given to the Commissioners for Building New Churches, to parcel out a district as a parish for ecclesiastical purposes only; and they might also, under s. 22, make an effectual and perpetual division of such parishes or districts for all intents and purposes whatsoever; but that has not been done in this case.

The parish of St. George the Martyr was created under this act, but from that time down to the 5 & 6 *Will.* 4, c. 76, the inhabitants of St. George the Martyr have been rated to the relief of the poor jointly, one assessment has been continued to be made, not only on the inhabitants of St. George the Martyr, but also on the inhabitants of the parish of St. Andrew's-above-Bars. It is true, that local acts have been passed from time to time relating to the management

of the funds to be raised by poor's rate, and from the language of some of them it would seem that St. George's and St. Andrew's-above-Bars were separate parishes ; but such language in local acts cannot alter the constitution of St. George the Martyr, which was fixed by the 10 *Anne*. The next question is, whether these places come within the definition of separate parishes under the act. Sect. 109 defines parish to be any place maintaining its own poor, and the affidavits clearly negative that fact with regard to either of these parishes, and show that the whole district of St. George the Martyr and St. Andrew's-above-Bars maintain their poor jointly. The whole district, therefore, comes within the definition of a single parish ; and, under s. 26, the Commissioners have the power to unite it to as many other parishes as they think proper. This case is clearly within s. 26, and there was no union existing to bring it within the exception of s. 32.

1838.

 The QUEEN
 v.
 The POOR
 LAW COMMISSIONERS.

WILLIAMS J.—I am entirely of the same opinion, and though the conclusion may not be arrived at in a few words, the question is in fact a very short one, namely, whether the places in question are comprehended within the meaning of the word *union* in s. 32. My opinion is, that they are not ; and if they are not, it is conceded that s. 26 gives the Commissioners the power which they have assumed. Two kinds of parochial divisions have been brought under our notice to-day, one under the statute of *Car. 2*, for purposes relating to the poor, and one under 10 *Anne*, for ecclesiastical purposes only. Under s. 8 of that act, it appears that a parish, called St. George the Martyr, was created for ecclesiastical purposes only ; and although, under s. 22, a division might have been made for all purposes whatever, nothing to that effect was ever done, as has already been pointed out by my brother *Littledale*. As far therefore as respects the maintenance of the poor, St. George the Martyr continued to be a portion of the parish of St. Andrew's-above-Bars, and being so, it

1838.

 The QUEEN
 v.
 The POOR
 LAW COMMIS-
 SIONERS.

was not a parish within the meaning of the 4 & 5 *Will.* 4, c. 76, s. 109. The next question arises upon the word *union*; and I must say I cannot accede to the argument that the definition of that word is to be looked for out of the interpretation clause, when we are called upon to interpret this act. A union of parishes for other purposes under local acts, is not a union within the meaning of this statute, which confines the term either to parishes united for any purpose under its own provisions, or incorporated under *Gilbert's* act, or under any local act for the relief of the poor. Within no one of these definitions does the present case come; nor is either of the places in question a parish within the meaning used in the act. It seems to me, therefore, that s. 26 gives the Commissioners power to make the order in question, and that there is nothing in s. 32 to restrain them.

COLERIDGE J.—I think this is a very clear case, and one of the shortest points that ever came before the Court. The whole question is, what the proper designation is of that portion of ground described in the title of the 6 *Geo.* 4, as that part of the parish of St. Andrew, Holborn-above-Bars, and the parish of St. George the Martyr. It is conceded, on the one hand, that, if the two districts I have mentioned form properly a union, the Commissioners cannot interfere; and, on the other hand, that if they do not already form a union, the Commissioners have power to unite them under s. 26. The two arguments mainly relied upon to exclude the Commissioners from acting were, first, that the information brought forward on the present occasion, as to the history of this district, was not known to the Commissioners, or acted upon by them; but I cannot accede to that argument; and it is obvious that the Court can only look at the facts as they present themselves. The other argument used was, that, to ascertain what the term *union* means, reference must be had to the various local acts affecting the parish. Whether these places were ever united formerly, I do not think it at all necessary to exa-

mine, and I will even suppose that point might be decided in favour of those who resist the order. But on the construction of the word *union*, as used in this act, it is obvious there must be a plurality of parishes, whatever meaning is to be given to the word *parish*. Then, on looking to the definition of the word *parish* in s. 109, it is clear that whether it be a district, place, or parish, properly so called, it must be a division maintaining its own poor. Supposing, for argument's sake, that St. George the Martyr might come within this definition, on looking to the other member of that which is alleged to constitute a union, namely, St. Andrew's-above-Bars, it is quite clear that that district has never maintained its own poor. But if so, there is a want of those component parts which the term *union* implies; and *ex concessis*, the argument founded on the exception in s. 32 falls to the ground.

Rule discharged.

WEBB v. BAKER.

ASSUMPSIT. The declaration stated that the defendant, on &c., was indebted to the plaintiff for goods sold. The second count was on an account stated. Special demurrer to the whole declaration, assigning for cause that the declaration was informal in not stating any time at which the account was stated.

Humfrey, in support of the demurrer, acknowledged that, as the demurrer was to the whole declaration, he could not support it, after the case of *Ferguson v. Mitchell* (a), and *Com. Dig. Pleader*, (Q 3); but he contended that as no time was necessary to be alleged in the count for goods sold, he was entitled to the costs on that issue; *Lane v. Thelwell* (b).

1838.
The QUEEN
v.
The POOR
LAW COMMIS-
SIONERS.

Friday,
January 19th.

On a demurrer to a whole declaration, containing several counts, if one count is good, the plaintiff is entitled to judgment generally.

Quare, per Lord Denman C. J., whether a count on an account stated is demurrable for not averring the time when it was stated.

(a) 2 C. M. & R. 687.

(b) 1 M. & W. 140.

1838.

WEBB
v.
BAKER.

Shee, contrà, relied on *Ferguson v. Mitchell* (a) and Serjt. *Williams's* note to *Duppa v. Mayo* (b). [*Coleridge J.* Serjt. *Williams* refers to *Com. Dig.* Pleader (Q 3), for the position, but *Comyn* refers to the principal case in *Saunders*, where the point was not decided, but only put *arguendo* by counsel.] *Powdick v. Lyon* (c) and *Spyer v. Thelwell* (d), are also authorities that a demurrer to the whole declaration, where one count is good, entitles the plaintiff to judgment, and costs follow as a matter of course.

LORD DENMAN C. J.—On the authority of those cases in the Exchequer, I think the plaintiff is entitled to judgment generally. At the same time I cannot at all see, upon principle, why time is more necessary to be averred on the account stated, than in the count for goods sold.

LITLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Judgment for the plaintiff.

(a) 2 C. M. & R. 687.

(c) 11 East, 565.

(b) 1 Wms. Saund 285 b, n. (9).

(d) 2 C. M. & R. 692.

BINNS and others, Assignees of HARRISON, an Insolvent Debtor, v. TOWSEY.

Tuesday,
January 23d.

A deed of assignment by an insolvent of all his effects, for the benefit of his creditors, executed during his imprisonment, without consideration and without pressure from any creditor, is voluntary, and void under the 7 Geo. 4, c. 57, s. 82.

ASSUMPSIT for money had and received, and on an account stated. Plea, non-assumpsit. At the trial before Lord Denman C. J., at the sittings after Trinity term, in Middlesex, 1836, it appeared that the plaintiffs claimed as the assignees of the Rev. S. H. Harrison, who had petitioned for his discharge under the Insolvent Debtors' Act, on the 17th June, 1835, and was discharged on 3rd December following. The defendant produced a deed of assign-

ment, and costs follow as a matter of course.

ment, made by Mr. *Harrison* whilst he was confined in Southampton prison for debt, on 14th November, 1834. By this deed Mr. *Harrison* assigned all his property, goods, chattels, and effects, (except the interest on 2096*l.* three per cents.) to the defendant and others, in trust to pay all his creditors who should come in under the deed. The defendant was the acting trustee under this deed, and the money sought to be recovered had come to him in that capacity. The defendant contended, that as this assignment was for the benefit of all the creditors, the case of *Davies v. Acocks* (a) shewed that the deed was not void. The Lord Chief Justice was of this opinion, and gave the defendant liberty to move to enter a nonsuit, the verdict having passed for the plaintiffs.

Blackburn, in the ensuing term, obtained a rule accordingly; against which

1838.

BINNS
v.
TOWSEY.

Cresswell and *Cleasby* now shewed cause. The ground assigned by part of the Court, in *Davies v. Acocks* (a), that a deed of assignment by an insolvent for the benefit of *all* his creditors is not void, was not necessary for the decision of that case, and is clearly not warranted by the terms of 7 *Geo. 4.* c. 57, s. 32; for that statute speaks of assignments to any creditor or creditors. *Alderson* B. differed from the rest of the Court, and suggested that the creditors of an insolvent had a right to have his estate administered according to the provisions of the act of which he takes the benefit. If such an assignment as this were allowed to operate, the creditors would be in a much worse position than if the assignment were made under the act: for instance, sect. 30 transfers to the provisional assignee of the Court all goods which the insolvent, by the consent of the true owner, had in his possession. So, under sect. 35, the assignees have various powers given and restrictions placed upon them, all of which are very much for the benefit of creditors. Besides, the assignment under the act is for

(a) 2 C. M. & R. 461.

1838.

 BINNS
 v.
 TOWSEY.

the benefit of all the creditors; whereas the present is only for such as choose to come in.

An assignment like the present, therefore, defeats the intention of the Insolvent Debtors' Act. The only difficulty arises on the construction of sect. 32, that such deeds of assignment are not to be deemed void "unless made within three months before the commencement of such imprisonment;" whereas this deed was made whilst the insolvent was in prison. This clause has been under discussion in the Court of Exchequer in *Beck v. Smith* (a), and *Parke* B. held that these words must mean "within a period commencing three months before the imprisonment." If this be not the right reading, it would exclude all conveyances made during the imprisonment, which would be clearly contrary to the intention of the act.

Cottingham, contra. This case is governed by *Davies v. Acocks* (b). An assignment by an insolvent in favour of all his creditors cannot be fraudulent. But for the express provision of the act, it would not be fraudulent, if it were even in favour of a particular creditor: *Holbird v. Anderson* (c), *Pickstock v. Lyster* (d). The argument on the other side proceeds entirely on the difference of distribution of an insolvent's property under one assignment and the other; but that argument failed in *Davies v. Acocks* (b). It was not left to the jury to say whether this assignment was made with a view of petitioning the Court for his discharge, and it was made nearly a year before he actually petitioned. The enacting clause, sect. 32, only makes void those deeds which are made within three months of the commencement of an imprisonment, which this was not.

LORD DENMAN C. J.—This is a deed of assignment, executed by an insolvent debtor for the benefit of his creditors; and the question is, whether it is void. By sect. 32,

(a) 2 M. & W. 196.

(b) 1 C. M. & R. 461.

(c) 5 T. R. 235.

(d) 3 M. & S. 371.

every deed made by such insolvent voluntarily, before or after his imprisonment, is declared to be fraudulent and void as against the provisional assignee. This deed was made without consideration, and therefore was voluntary, which brings it within all the enacting portions of the clause. But there is a provision that such deeds shall not be void, unless made within three months before the commencement of such imprisonment, or with the view of petitioning the Insolvent Debtors' Court for a discharge. I do not think that proviso applies to a deed made after the imprisonment has commenced. The enacting portion of the clause applies to deeds whenever made; and I think the exception (which is not incorporated in the enacting portion) must be confined to the two cases expressly pointed out. This construction is consistent with the ruling in *Davies v. Acocks* (a); for the argument there was, that the deed was fraudulent, because it was voluntary; but the Court said it was not voluntary, and cited the case of *Arnell v. Bean* (b), where *Tindal C. J.* distinguishes between voluntary and fraudulent, and defines the former of these two terms. I therefore think we are not at all clashing with the decisions when we hold that this deed is void.

1838.
BINNS
v.
TOWSEY.

LITLEDALE J.—The first question here is, whether this deed was voluntary or not. A deed is voluntary when made without consideration; and it appears that the insolvent gave up all his property without consideration: therefore so far it was voluntary. But then there is a question, whether it was made under the pressure of any creditor,—of which there is no appearance. If neither of these two cases occur, a deed like the present is voluntary, within the 7 *Geo. 4*, c. 57, s. 32. Then comes the proviso; and the question is, whether it applies to assignments made after the imprisonment has commenced. The question was not left to the jury, whether it was made with a view of petition-

(a) 1 C. M. & R. 461.

(b) 8 Bing. 91; S. C. 1 M. & Scott, 151.

1838.

 BINNS
 v.
 TOWSEY.

ing the Court; therefore that point does not avail. The point therefore arises on the first part of the exception. This deed certainly does not come within the express words of the act; for it was not made within three months before the commencement of the imprisonment: but I think, to satisfy that exception, the deed should be made more than three months before the imprisonment commences: for, as the former part of the clause extends to all deeds made at any time, without regard to any view as to petitioning the Court, if the exception were to exclude all assignments made during the imprisonment, the enactment would be almost wholly nugatory.

WILLIAMS J.—I am of the same opinion. The language of sect. 32 is very indistinct and inaccurate. The first part of the section renders void the voluntary assignments of a prisoner made before or after his imprisonment, but the words of the proviso only seem to apply to assignments made within three months before the commencement of such imprisonment. I think, however, that this was clearly a voluntary conveyance within the enacting clause of the section, and therefore void.

COLERIDGE J.—There are two questions in this case; first, whether this deed is within the enacting clause of sect. 32, and, second, whether it is taken out of it by the exception. With regard to the first point, on comparing the facts with the terms of the enacting clause, this appears to be the case of an insolvent debtor, who, after his imprisonment, makes an assignment of his property for the benefit of his creditors. In order to bring such an assignment within the act, the conveyance must be voluntary. *Tindal C. J.* gives the correct definition of "voluntary" in *Arnell v. Bean (a)*, viz. that it denotes either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bonâ fide* under the influence

(a) 8 Bing. 91; S. C. 1 M. & Scott, 151.

of such considerations, or an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it. In that case no fraud was suggested, and the Court thought, under the circumstances, the conveyance was not voluntary. In this case I understand the assignment to have been for the benefit of all the creditors. But as sect. 32 expressly says assignments made to "any creditor or *creditors*," it is clear that that circumstance alone does not exclude it from the words of the act. The second question then is, whether this case is within the exception. It certainly was not made within three months before the commencement of the imprisonment; and if any point had been left to the jury as to its having been made with a view of petitioning the Court, they probably would have found that it was not. I think, however, that the former exception applies only to assignments made before the imprisonment. There was an obvious reason for selecting the commencement of the imprisonment as a term from which to decide the question whether the conveyance was fraudulent or not, because the time at which such conveyance is made throws the greatest light upon the question. But when once an insolvent is in prison, I think the act makes whatever deed he executes void, because it serves in some way or other to defeat the provisions of the act.

1838.
BIRNBS
v.
TOWSEY.

Rule discharged.



1838.

Friday,
January 19th.

BANKS v. ANGELL and RAWLINGS.

1. In an avowry on the 21 *Hen.* 8, c. 19, the defendant must allege in the avowry that the defendant is seized of the lands in which &c.

2. In an avowry on the 11 *Geo.* 2, c. 19, the defendant must shew a privity existing between himself and the tenant on the land, and it is not sufficient to state that certain persons unknown are tenants to the defendant under a demise by one J. A. to W. W., the unexpired term of which had vested in these persons unknown.

3. When the defendant avowed that certain persons to the tenants unknown held the close in which &c. as tenants to the defendant under a demise from one J. A. to W. W. for a term unexpired, and that the interest of W. W. in the term had come to the said persons unknown, and that the rent was in arrear to the said defendant :

—Held, that the avowry was not good under either of the above statutes, or under both of them taken together.

4. When the declaration in replevin does not sufficiently specify the goods and chattels, and the place in which they are taken, the defect is cured by an avowry justifying the taking of the said goods and chattels in the said place, even though the avowry be a bad plea.

REPLEVIN, for that the defendant, on &c., at the parish of L. in the county of S., in a certain close there, took the goods and chattels, to wit, part of a rick of hay of the plaintiff, &c. The defendants avow and make cognizance of the taking the said goods and chattels in the said close in which &c., because they say that a certain person or persons to the defendants unknown, for a long time, to wit, for the space of one year next before &c., and from thence until and at the said time when &c., held and enjoyed the said close in which &c., with the appurtenances, as tenant or tenants thereof, to the defendant *William Angell*, under and by virtue of a certain demise of the said close in which &c., together with the premises theretofore made, by one *John Angell* to one *William Wescombe*, for a certain term of years, which was not then and is not yet expired, at a certain yearly rent, to wit, the yearly rent of 100*l.*, payable half-yearly, on the 25th day of March and the 29th day of September in every year, the said person or persons being a person or persons to whom all the estates, interest, and term of years of the said *William Wescombe*, of and in the said close in which &c. had come, and in whom the same, during all the time aforesaid, was legally vested by assignment thereof before that time duly made, and because the sum of 100*l.* of the rent aforesaid, for the space of one year, ending as aforesaid, on &c., and from thence until and at the said time when &c. was due and in arrear from the said last-mentioned person or persons to the said defendant *William Angell*, under and by virtue of the said demise ; he the said defendant *William Angell*, in his own right, well avows, and the said defendant *Wil-*

liam Ingram Rawlings, as bailiff of the said defendant *William Angell*, well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said close in which &c., and justly &c., as for and in the name of a distress for the said rent so due and in arrear to the said defendant *William Angell* as aforesaid, and which still remains due and unpaid; and this they the said defendants are ready to verify: and the said defendant *William Angell*, in his own right, further well avows, and the said defendant *William Ingram Rawlings*, as bailiff of the said defendant *William Angell*, further acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said close in which &c., and justly &c.: and the said plaintiffs further avow &c., because they say that a certain person or persons to the defendants unknown, for a long time, to wit, for the space of one year next before and ending on the 29th day of September, 1832, and from thence until and at the said time when &c., held and enjoyed the said close in which &c., with the appurtenances, as a tenant or tenants thereof to the said defendant *William Angell*, under and by virtue of a certain demise thereof, together with certain other premises theretofore made by one *John Angell* to one *William Wescombe* for a certain term of years which was not then and has not yet expired, at and under a certain yearly rent, to wit, the yearly rent of 100*l.*, payable by equal half-yearly payments, that is to say, on the feast day of the Annunciation of the Blessed Virgin Mary, and of St. Michael the Archangel, in every year; and of which said rent a large yearly sum, to wit, the yearly sum of 20*l.*, during all the time aforesaid, was and is a fair and just apportionment in respect of the said close in which &c., and part of the said other premises; and which said person or persons who so held as tenant or tenants as aforesaid, was or were, during the time aforesaid, a person or persons to whom all the estate and interest and term of years of the said *William Wescombe* of and in the said close in which &c., had come, and in whom

1838.

BANKS
v.ANGELL
and another.

1838.

 BANKS
 v.
 ANGELL
 and another.

the same, during all the time aforesaid, was vested by assignment thereof before that time duly made, and because the sum of 20*l.*, being a just and fair apportionment of the said rent in respect of the said close in which &c., and the said last-mentioned part of the other premises so demised as aforesaid, and which said last-mentioned part was also, during all the time aforesaid, held of the said defendant *William Angell*, under and by virtue of the said demise, for the space of one year ending as aforesaid, on the said 29th day of September, 1832, and from thence until and at the said time when &c. was due and in arrear to the said defendant *William Angell*, under and by virtue of the said demise, the said defendant *William Angell*, in his own right, well avows, and the said defendant *William Ingram Rawlings*, as bailiff of the said defendant *William Angell*, well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said close in which &c., and justly &c., as for and in the name of a distress for the said apportionment of the rent so due and in arrear to the said defendant *William Angell* as aforesaid, and which still remains due and unpaid; and this the said defendants are ready to verify &c.

Demurrer. Causes assigned, that neither of the avowries and cognizances demurred to states who held the premises as tenant or tenants, or from whom in particular the rent distrained for was due: that they are not framed either at common law or according to the statute 11 *Geo.* 2, c. 19, s. 22: that the last avowry and cognizance does not state that the apportionment of rent distrained for was due from any person: and also the several grounds of demurrer and matters of law set forth in the special grounds of demurrer: and also that it is not stated in either of the said avowries and cognizances that *William Angell* ever had the reversion expectant upon the determination of the term of years therein mentioned, and no title is in either of those avowries and cognizances deduced to him to such reversion; nor is it in either of those avowries or cognizances alleged that he

was ever possessed of the rents in those avowries and cognizances, or either of them, mentioned, by the hands of any tenant, nor is it therein alleged that the premises therein mentioned were within any fee or seigniorship of the said *William Angell*, according to the statute 21 *Hen.* 8, c. 19, s. 2.

1838.

 BANKS
 v.
 ANGELL
 and another.

Channell, in support of the demurrers. These avowries are of the first impression, and are good neither at common law nor under the statutes. The 21 *Hen.* 8, c. 19, enables the lord to make avowries upon the land without naming the tenant. Section 2 enacts, that wheresoever any manor lands, tenements, and other hereditaments, be holden of any manor person or persons, by rents, customs, or services, that if the lord of whom any such manor lands &c., be so holden &c., distrain upon the same manors, lands &c. he may avow &c., upon &c., so holden as in lands within his fee or seigniorship, without naming of any person certain to be tenant of the same. But this statute only applies to manorial lands holden of a superior lord, or, at all events, to lands holden by a tenant in fee. This appears from *Co. Litt.* 268 a, and 269 b. *Littleton* (s. 457) speaks of very lord and very tenant, and Lord *Coke* says this is to be understood of a lord in fee simple and of a tenant of like estate; and throughout the comment on the section he treats the tenant as one holding in fee. So in *Comyn's Dig.* Pleading, Pleading in Replevin (3 K 15), where it is laid down that "since the 21 *Hen.* 8, c. 19, he (the lord) need not allege any certain tenant;" this position follows an enumeration of services for which avowry may be made, as rent service, homage, heriots &c., which shews that in all the cases where avowry may be made without naming the tenant, a tenant in fee is contemplated. The case in 1 *Lev.* 301 (a), which is cited for *Comyn's* position, confirms this view, as in that case the avowry was in respect of homage. The

First point:
 An avowry
 under 21 *Hen.*
 8, c. 19, must
 allege the
 lands to be
 within the
 lord's fee.

(a) *Lacy v. Fisher*, 1 *Leon.* 301; *S. C.* as *Lacy v. Fisher*, *Cro. Eliz.* 146.

1838.

BANKS
 v.
ANGELL
 and another.

avowry is also bad under this statute for not alleging seisin in the defendant; *Com. Dig.* ut sup.; *Bucknal's case* (a), *Gilbert on Rep.* 182: or that the lands were held as within his fee and seigniory. The avowry states that certain persons unknown held the close in which &c. as tenants, to the defendant under a lease made by one *John Angell*, but there is no allegation that the defendant was seised in fee of this close. The most that can be made of the averment is, that the reversion in the lease had come to the defendant; but that is very different from a seisin in fee. The defendant, therefore, has not shewn any right to distrain under 21 *Hen.* 8, c. 19.

Second point:
 An avowry
 under the 11
Geo. 2, c. 19,
 must state the
 name of the
 tenant.

Nor can the avowry be sustained under the 11 *Geo.* 2, c. 19, s. 22. The first part of that clause enables defendants in replevin to avow generally, that the plaintiff in replevin, or other tenant of the lands whereon the distress was made, enjoyed the same under a grant or demise at such a certain rent, without setting forth any title in the landlord. But this clause requires the name of the tenant to be stated; the statute was only passed to obviate the necessity of stating the landlord's title. In *Sullivan v. Stradling* (b) the form of an avowry is given; and doubts were entertained there whether this act applied to a stranger at all. The remainder of the clause in section 22 enables the landlord to avow that the place where the distress was taken was parcel of such certain tenements held of such honor, lordship, or manor, for which tenements the rent was due, without setting forth the landlord's title. If it had been alleged that the defendant was seised in fee of the place in which &c., then perhaps the 21 *Hen.* 8 might have been incorporated with this statute, so as to have made this avowry good.

Third point:
 Uncertainty in
 a declaration
 as to the things
 distrained and
 the place
 where, cured
 by pleading
 over.

But objection will probably be made to the declaration, that the close is not particularly described, and that "rick of hay" is not sufficiently certain. The defect, if any, is cured by pleading over. The defendant shews that he is

(a) 9 Rep. 33 b.

(b) 2 Wils. 308.

not misled, for he acknowledges the taking of the goods in the said close. The description in replevin was formerly required to be much more strict, but now the certainty that is sufficient in trover or trespass is also sufficient in replevin, if the defect be not pointed out on special demurrer. This appears from the cases cited by Serjt. *Williams* in his note to *Taylor v. Wells* (a), and particularly from *Kempston v. Nelson* (b). The certainty required in replevin as to the goods taken, was to enable the sheriff to make a return; but it was held in those cases, that the sheriff is not bound to execute the writ of delivery unless somebody attend to point out the things to be delivered. *Bullythorpe v. Turner* (c) also shews, that the defect arising from the uncertainty of place in the declaration is cured by pleading over, and the learned editor of *Willes* has collected in a note to that case the authorities, which shew that the law is the same as to uncertainty in the goods. In *Buller's Nisi Prius*, p. 53 a, both points are stated, namely, that a want of certainty as to the things distrained, and as to the place where, is only bad on demurrer, and is made good by avowry; and for this he cites *Moore v. Clypsam* (d), *Reude v. Hawke* (e), and the above case in *Willes* (c).

1838.
BANKS
v.
ANGELL
and another.

Peacock contra. The avowries are unusual in not stating the name of the tenant; but the circumstances of this case are also unusual. It is not often the case that a landlord is ignorant of the name of his tenant, but that must happen occasionally in the case of old leases, where the original tenants are dead, and the leases have been assigned. The avowries are good under the 21 *Hen. 8*, for that statute enables the lord to distrain on lands holden of him, as on lands within his fee, and it sufficiently appears here that these lands are holden of the defendant. If it should be

First point.

(a) 2 Wms. Saund: 74.

(d) Aleyn, 22; 8. C. 8ty. 71.

(b) Bac. Abr. Replevin (H).

(e) 1 Hob. 16; 8. C. Godb. 186.

(c) Willes, 476, n. (a).

1838.

BANKS

v.

ANGELL
and another.

Fourth point:
The avowry
good under the
two statutes
taken together.

Second point.

thought that the defendant's title as landlord is not sufficiently stated, that is cured by the 11 Geo. 2, which allows the defendant's title to be stated generally. It is true that at common law a seisin must be alleged, *Co. Litt.* 268 a, but that is only when the commencement of the rent does not appear by the avowry (a). [Coleridge J. How do you shew a holding by the defendant at all, for the lease is stated to have been granted by *John Angell*, and you do not shew any connection between *John Angell* and the defendant?] That certainly is a difficulty, and it would be fatal as an avowry at common law; but it is helped by 11 Geo. 2, for persons unknown are stated to be tenants to the defendant under that lease. The 21 Hen. 8 got rid of the difficulty of landlords naming the persons holding lands as tenants, and was passed to enable them to avow upon the land; the 11 Geo. 2 was enacted to relieve landlords from another difficulty, viz. that of deducing their title, but not to impose on them that difficulty which had been removed by the 21 Hen. 8; the avowries, therefore, taken under the two statutes together, are good. But they are good under the 11 Geo. 2, c. 19, alone. It is a rule in pleading, that the names of parties are to be given in the pleadings; but if the name of a party is unknown to the party pleading, it is sufficient to make an allegation to that effect, and that is as good as setting forth his name; *Stephen on Pleading*, 353, 2d edit., *Berkley v. Thomas* (b), *Partridge v. Strange* (c), *Hartley v. Hering* (d), *Rex v. De Berenger* (e), and *Young v. Murphy* (f). So in criminal pleadings a party may be indicted for the murder, or for stealing the goods, of a person unknown. The recital of the 21 Hen. 8 shews, that in legal contemplation a landlord may have a tenant whose name is unknown to him, and therefore, on the principle of those cases, and also in analogy to criminal pleadings, the omission of the tenants' names may be made where suffi-

(a) See Gilb. on Rep. 187.

(b) Plow. 128 n.

(c) Plow. 85.

(d) 8 Term Rep. 130.

(e) 3 M. & S. 67.

(f) 3 Bing. N. C. 58.

cient reason is alleged for it, if the party pleading takes upon himself to aver that their names are unknown, which imposes upon him the necessity of proving at the trial that the parties names are really unknown; *Rex v. Walker (a)*, *Rex v. Robinson (b)*. The avowries are in the form given by the 11 Geo. 2, c. 19, with the exception of not setting forth the name of the tenant, and the allegation that the tenant's name is unknown, is in lieu of stating his name. The statement at the end of the avowry, that the said person or persons was or were a person or persons to whom all the estate &c. of *William Wescombe* had come by assignment, shews the reason why the defendant might reasonably be presumed to be ignorant of the name of his tenant, though imposes upon the defendant the necessity of proving at the trial that the person alleged to be his tenant, although his name was unknown, was the assignee of *Wescombe's* lease, whoever he might be.

1838.
BANKS
v.
ANGELL
and another.

But the declaration is bad on general demurrer. In *Third point. Potten v. Bradley (c)*, it was held necessary to state the name of the close or its abutments. That was certainly on special demurrer. But it would seem also to be bad on general demurrer. For the defect is not one which would be cured upon general demurrer, either by the statute 27 Eliz. c. 5, or the 4 Ann. c. 16. In *Ward v. Lavile (d)*, and *Read v. Hawke (e)*, such a defect was held bad upon general demurrer. Both of these cases was after the 27th Eliz. c. 5; and *Hooker v. Nye (f)* shews that such a defect as this is not within either of those statutes. The goods, also, are not described with sufficient certainty. In *Pope v. Tillman (g)*, where the goods were described generally, as in the present case, final judgment was arrested after judgment by default, which shews that the error is one of substance, and not cured by 4 Ann. c. 16. That statute only cures defects in form of a like nature to those

(a) 3 Camp. 264.

(b) Holt, 595.

(c) 2 M. & P. 78.

(d) Cro. Eliz. 896.

(e) Hob. 16; S. C. Godb. 186.

(f) 1 Cr. M. & R. 259.

(g) 7 Taunt. 642; S. C. 1 B. Moo. 386.

1838.
 ~~~~~  
 BANKS  
 v.  
 ANGELL  
 and another.

enumerated in its enactments. In *Bullythorpe v. Turner* (a), there was a demurrer to the replication, and then the defendant wanted to go back to the declaration; but the Court said the plea was good, and therefore any defect in the declaration is cured. Here the pleas are supposed to be bad, and no authority shews that a bad plea cures a bad declaration. [Lord Denman C. J. The Court in that case did not set up the goodness of the plea as a reason for curing the defect, but held, that as the defendant acknowledged the taking &c., the defendant was not misled by any want of certainty. In *Vin. Abr.* Replevin (E), pl. 9, the case from *Hobart*, p. 16, is cited by the name of *Read v. Haws*, where it appears to have been held that a declaration in replevin, when the place is not particularly described, is good, if the objection be not taken on demurrer.] That would probably be so after verdict when the avowry remains good. In *Holmes v. Hodgson* (b), it was held that an insufficient description of goods in trespass was matter of substance. It is difficult to see on principle how pleading over can do more than cure errors in form. [Littledale J. In *Weston v. Carter* (c), *Bridgeman* C. J. held, that although the place ought to be named in the declaration, if the defendant pleads over and does not demur, it is good. Pleading over must certainly cure these defects; the objection is, that the defendant does not know what taking is complained of; in his avowry he shews that he does, and justifies it.]

*Channell*, in reply. The point relied upon for the avowries appears to be, that at common law the landlord may leave out the names of the tenants on whose lands he distrains, if he does not know them. That rule of pleading, however, only applies to strangers. The power of distress arises out of the intimate relation existing between landlord and tenant; and the best answer to the argument is, the necessity for the statute 21 *Hen. 8*, to enable the landlord,

(a) *Willes*, 476.

(b) 8 B. Moore, 379.

(c) 1 Sid. 9; *S. P. Hill v. Bunning*, ib. 17, 20.

in certain cases, to omit the tenants' names. At common law it was necessary to name the person avowed on, in order to enable him to pray in aid the tenant, and the legislature only could dispense with this necessity. The 21 *Hen. 8*, only relieves the landlord when the lands are within his fee; it was also a benefit to tenants, as it enabled them to plead that the lands were out of the lord's fee. The second clause of 11 *Geo. 2*, c. 19, s. 22, seems to have been introduced to apply to cases where the lands were within the lord's fee. In such cases it dispensed with the statement of the lord's title. But when the lands were not within the fee, the avowry must be at common law.

1838.  
BANKS  
v.  
ANGELL  
and another.

Lord DENMAN C. J.—It appears to me that these avowries cannot be sustained. They are clearly not within the 21 *Hen. 8*, c. 19, for that statute requires a seisin in fee in the landlord. I also think they are not within the 11 *Geo. 2*, c. 19, s. 22, for if so, although under that statute the title of the landlord may be alleged generally, yet if the defendant takes upon himself to set out more of title than he is required to do, he must shew how he is entitled under the allegations he has chosen to make,

First point.

Second point.

LITLEDALE J.—These avowries are not good at common law. The 21 *Hen. 8*, c. 19, was passed to enable landlords to make distresses and avow without naming any person certain as tenant. The object of that statute was to prevent landlords from being ousted of their remedy by their tenants making feoffments in fee to persons unknown to them; but it does not appear that a landlord could avow under that statute without alleging the lands to be holden as within his fee and seignior. The first objection made is, that no seisin is alleged in the defendant. I will not say that seisin is necessary to be alleged in all cases, for in 1 *Roll. Abr.* 314, it is laid down, that "if a man makes a gift in tail, rendering rent, he may avow without laying any seisin, because the reversion gives him a sufficient privity, and he

First point.

1838.

BANKS  
v.ANGELL  
and another.

will declare on the reservation." That, however, would be shewing what is tantamount to a seisin. It is not necessary to decide this point, for it is clear from that case, that if the privilege given by this statute be relied upon, of omitting the tenant's name, although seisin be not alleged, privity ought to be shewn between *John Angell* and the defendant. But all that the avowries state is, that the persons unknown are tenants to the defendant under a lease granted by *John Angell*, and therefore they shew no privity at all, even if seisin may be dispensed with. Then is the avowry good under the 11 *Geo. 2*, c. 19? It has always been usual under that statute to aver that the plaintiff in replevin held of the defendant, or that some other person so held, for the goods of the plaintiff, as a stranger, might be taken; but it is quite necessary that the tenant of the lands should be named, for otherwise the plaintiff could not plead in bar.

Second point.

Fourth point.

Third point.

The avowry, therefore, not being sustainable under either of the statutes, they cannot be supported by compounding the two together. The proceedings must be under one or other of them. I also think the declaration is sufficient after the avowry. The defendants, in their avowry, take upon themselves to justify the taking the goods. They admit, therefore, they know where they were taken. As to the insufficient description of goods and chattels, *Playter's* case (a) and the older cases would shew that it was insufficient; but it is too late now to contend for such a construction.

First point.

WILLIAMS J.—The avowry is not good on the 21 *Hen. 8*, c. 19. The language of that statute, enabling the lord to avow for the distress, "as in lands or tenements within his fee or seigniori," clearly points out that that allegation is necessary, and the commentary of Lord *Coke* leaves no doubt upon the subject. I have still less doubt that the

Second point.

avowry is bad on the 11 *Geo. 2*, c. 19. That act dispenses

with the necessity of setting out the landlord's title in detail, but these avowries do not shew that the defendant had any title at all, or what the connection was between him and *John Angell*. I also think that the objection to the declaration should have been taken by special demurrer. The objection is, that the defendant cannot tell with certainty what distress is complained of; but when the defendant undertakes to answer the taking, he surely admits that he understands the charge.

1838.  
BANKS  
v.  
ANGELL  
and another.  
Third point.

COLERIDGE J.—It is first contended that the avowry is good under the 21 *Hen.* 8, and to consider this question, the 11 *Geo.* 2, c. 19, must be kept out of view altogether. The evil provided against in the former statute was, the secret feoffments and leases made by tenants to persons unknown to their landlords, and the remedy provided was, that lords might avow for distresses, without naming any person certain as their tenant; but that statute left the necessity for a landlord shewing a specific title as at common law, for otherwise where would have been the necessity for the 11 *Geo.* 2? The argument is founded on the words in the statute, that the lord may avow for distresses taken on lands holden of him, as in lands within his fee or seignior, and therefore that it is sufficient if it appear by the avowry that the lands are holden of him. But that is not so, for it has always been necessary to aver that the lands are within the lord's fee. All the authorities collected in *Com. Dig. Pleader, Avowry* (3 K 15), shew this; and in *Paramor v. Chapman* (a), where the defendant avowed upon the statute as within his fee and seignior, and the plaintiff pleaded nil tenuit generally, the plea was held bad; but it was held that a plea that the lands were not within the defendant's fee, would have been good, which seems to shew clearly that the 21 *Hen.* 8 only applies to lands so held. Then, can this avowry be supported on the 11 *Geo.* 2, c. 19? That

First point.

Second point.

1838.

BANKS

v.

ANGELL  
and another.

statute was passed on account of the difficulty which Mr. Serjt. *Williams*, in one of his notes (a), points out to have existed in framing an avowry for rent at common law, by the plaintiff being enabled, often against the merits of the case, to derive great advantage by traversing some part of the defendant's title. To remedy this difficulty, the statute enacted that it should be sufficient for defendants in replevin to avow generally that the plaintiff held the lands, without further setting forth the title of such landlord. But these avowries are not drawn on this statute; it appears on the face of them that the defendant is an entire stranger to the tenants of the land, and he shews no connection whatever between himself and the landlord.

Third point.

I quite agree, also, that the objection to the declaration cannot be sustained.

Judgment for the plaintiff.

(a) 2 Wms. Saund. 284 c, note 3, to *Poole v. Longueville*.

Thursday,  
Jan. 26th.

DOE d. BROUGHTON v. STORY.

1. The assignment of an insolvent debtor's estate and effects to the creditors' assignee, under

7 G. 4. c. 57, s. 19, by the provisional assignee, according to the form pointed out by sect. 11, for the assignment by the prisoner to the provisional assignee, is valid.

2. The 11 Geo. 4 and 1 Will. 4, c. 38, s. 7, recites, that doubts had existed as to the validity of the assignment from the provisional assignee to the creditors' assignee, and enacts that such assignment, if made in obedience to the order of the Court, shall be deemed valid. At a trial where the validity of the assignment from the provisional assignee was in question, a copy of the counterpart of the assignment from the provisional assignee, filed of record, was produced, sealed with the seal of the Insolvent Debtors' Court; which assignment recited that it was made by the order of the Court, and two orders of the Court were also produced removing the assignees to whom the provisional assignee had assigned, and appointing others:—Held, upon this evidence, per *Coleridge J.*, that there was sufficient evidence to assume that the provisional assignee had made the assignment in obedience to the order of the Court; *sed quære*, per Lord Denman C. J., *Littledale* and *Williams Js.*

**EJECTMENT** for premises at Croydon. At the trial before *Tindal C. J.*, at the Surrey spring assizes, 1836, the lessor of the plaintiff claimed as assignee of *Charles Joseph Lawrence Bennett*, an insolvent debtor. It appeared that

1838.


 Doe  
v.  
Story.

the insolvent filed a petition for his discharge in September, 1827, and thereupon made a provisional assignment of his property, according to the form given in the schedule to 7 Geo. 4, c. 57. The lessor of the plaintiff produced a copy of the counterpart of the assignment made to the provisional assignee, and of the assignment made by the provisional assignee to a Mr. *English*, a creditor, sealed with the seal of the insolvent debtors' court, and bearing the certificate of the provisional assignee, as directed by 7 Geo. 4, c. 57, s. 19. He also produced an order of the court removing Mr. *English* as assignee, and appointing himself and the defendant as assignees, and a similar order removing the defendant. The assignment to *English* recited that it was made by the order of the court, and pursued in substance the form given in the schedule to 7 Geo. 4, c. 57. It was objected for the defendant, that this assignment was insufficient to pass the insolvent's real estate from the provisional assignee to *English*; the 7 Geo. 4, c. 57, s. 19, not warranting such an assignment, and that it ought to have been made by some of the conveyances which are required at common law, and that if the 11 Geo. 4 and 1 Will. 4, c. 38, s. 7, was relied on to render it a good assignment, it was necessary to prove that the assignment was made in pursuance of the order of the court. The Lord Chief Justice directed the jury to find a verdict for the lessor of the plaintiff, giving leave to the defendant to move to enter a nonsuit, if the Court should think the objections relied on, were valid.

Sir *W. W. Follett*, in the ensuing Easter term, obtained a rule nisi for a nonsuit, on the above point, and also upon an objection to the insolvent's title to the property, arising from a supposed estoppel, which, upon the discussion of the rule, the Court was clearly of opinion amounted to nothing, and therefore the arguments upon it are omitted.

*Platt* and *C. R. Turner*, now shewed cause. If the assignment from the provisional assignee to the creditors' assignee is not warranted by the 7 Geo. 4, c. 57, s. 19, it is rendered

First point:  
If assignment  
from provi-

1838.

Doe

v.

STORY.


sional assignee  
informal, cured  
by 11 Geo. 4  
and 1 Will. 4,  
c. 38.

valid by the 11 Geo. 4 and 1 Will. 4, c. 38, s. 7. That section recites that doubts had existed as to the validity of such conveyances, and to remove them, enacts, that for the future the form of conveyance given in the schedule to that act shall be used, and that every such conveyance theretofore made in obedience to the order of the court shall be deemed valid and effectual. The assignment from the provisional assignee to *English*, recited that it was made by the order of the court, and inasmuch as he is a public officer, and would have been guilty of a breach of duty if he had made the assignment without the order of the court, the Court will presume that that order was made according to the principle laid down in *Rex v. Whiston* (a).

Second point:  
An assignment  
from the provi-  
sional assignee  
to the credi-  
tors' assignee,  
is good in the  
form given in  
7 Geo. 4, c. 57.

But the assignment was a good one under the 7 Geo. 4, c. 57, s. 19. The 11 Geo. 4 and 1 Will. 4, c. 38, recited only that doubts existed as to the validity of such conveyances, and provides a form for the future, but there is nothing in the act to shew that the assignment in question is not valid, and it is submitted that it is. It is necessary to refer to sections 11 and 19 of 7 Geo. 4, c. 57, and on observing what it is that the legislature requires to be assigned by the latter section, it will appear clearly that no common law conveyance would suffice, and that the form of conveyance pointed out in the 11th section, was that which the legislature intended to be used in both cases. Section 11 provides for the conveyance and assignment from the insolvent to the provisional assignee, in the form to the act annexed, of all the estate, right, title, interest and trust of the prisoner, in and to all estates, &c. and all future estates which he might purchase, or which might descend or be devised to him, before he should be entitled to his discharge. Then section 19 enacts, that the estate, effects, rights and powers of the prisoner, vested in such provisional assignee as aforesaid, shall be conveyed and assigned (using the same words) to the creditors' assignee; and after such conveyance

and assignment, "all the estate and effects of such prisoner shall be, to all intents and purposes, as effectually and legally vested by relation in such assignee, as if the said conveyance and assignment had been made by such prisoner to him."

1838.  
  
 Doe  
 v.  
 Story.

It is clear from this section that it was intended the creditors' assignee should take from the provisional assignee all that he had taken from the prisoner. It is also clear that this could not be effected by any of the common law conveyances, such as lease and release &c., for they could not pass future estates and mere possibilities; the legislature therefore must have intended that the form pointed out by them in sect. 11, should be adopted in the conveyance from the provisional to the creditors' assignee. And it was quite necessary that this form should be used to carry the act into effect, for as many months might elapse between the assignment and the prisoner's discharge, if the estates to be acquired in that interval did not pass to the creditors' assignee, one great object of the act would be defeated.

Sir *W. W. Follett* and *Channell*, *contra*. It is clear that Second point. unless this assignment is good under one of the statutes, it is bad altogether, for the purposes of passing real estate. It is not good under the 7 *Geo. 4*, c. 57, s. 19, for that section does not point out any form whatever; it speaks of a conveyance and assignment, but that, in default of any specific form, must be according to some of the modes known at common law. The language describing what is to be conveyed to the creditors' assignee differs from that used in the 11th section, and may be all satisfied by using the ordinary conveyances recognized at common law. The arguments, therefore, as to the importance of the insolvent's future estate vesting in the creditors' assignee, fall to the ground, for if the statute has not prescribed how that shall be done, the rules of the common law must prevail. [*Cole-ridge J.* Do not the words in sect. 19, prescribing that a counterpart of every such conveyance made by the provisional assignee, shall be filed of record, and that a copy of any

1838.

Dox  
v.  
Story.

such record shall be received as evidence, denote that it was intended the conveyance should be by one instrument?] Not necessarily; it may mean a conveyance by lease and release; or if the legislature intended a conveyance by one deed, it does not follow that it intended that after-acquired estates should pass. As the effect of that clause is only to give to a copy the effect of an original, it does not waive any objections that might be made to the original. The form of conveyance given in the schedule, and which has been adopted here, only applies to the assignment to the provisional assignee, but that assignment is intended to be conditional only, and therefore it could not have been intended to be the form of an assignment under the 19th section.

First point.

Then how can the 11 *Geo.* 4 and 1 *Will.* 4, c. 38, s. 7, be called in aid, without the case being brought expressly within the terms of the clause? The principle of law is not disputed, as to the presumption that is afforded to the acts of a public officer; but when a statute contains a retrospective clause, all the conditions required by that clause must be proved to exist, before it can have effect given to it. That has not been done here, for it is clear that the recital in the assignment by the provisional assignee, that it is done by the order of the court, is no more than his bare declaration.

Lord DENMAN C. J., after stating the facts, continued thus:—We have now to consider whether the title of the assignee who took from the provisional assignee is good or not, for as to the supposed estoppel and declaration that have been relied upon, not a single authority or sound principle have been brought forward to make it necessary for us to entertain the question.

The single point is, whether this assignment made by the provisional assignee is valid, and it depends, in my opinion, on the construction to be given to the 7 *Geo.* 4, c. 57, s. 19.

First point.

The 11 *Geo.* 4 and 1 *Will.* 4, c. 38, s. 7, recites that doubts

1838.



Doe

v.

Story.

had existed as to the validity of the assignments made under the previous act, and enacts that all such assignments theretofore made in obedience to the order of the court shall be deemed valid; but I confess I feel considerable doubt, whether in this case, if the assignment depended upon the proof of the order of the court which was furnished, it would have been sufficient. I think that when validity is to be given to an instrument, as having been made by an order of the court, that order should be produced, and that no intendment should be made on the ground of the act being rightly done, when the legislature expressly points out the order of the court as that which shall make such instrument valid. That act, however, does not state that such assignments are void, it only recites the doubts that had existed, and provides for the future. We are therefore thrown back on the question, whether such an assignment is void under the 7 Geo. 4, c. 57, s. 19. On looking at sections 11 and 19, though it is impossible to avoid feeling doubts on the subject, they are not so serious as to make me say this assignment was insufficient. Section 11 requires an assignment to the provisional assignee, of all the estate, right, title, and interest of the prisoner, of and in all his estates &c. present and to come, and the assignment is to be in the form annexed to the statute. Then comes sect. 19, which requires the provisional assignee to assign to the creditors' assignee, and looking at the two sections together, I cannot doubt that it was the intention of the legislature, that all that had passed to the provisional assignee should be re-assigned by him, and that the form which was prescribed by the legislature for one purpose should be good also for the other. On this ground, I think the title of the assignee sufficiently made out.

Second point.

LITLEDAL J.—It seems to me that the assignment is good under the 7 Geo. 4, c. 57, s. 19, without looking at the 11 Geo. 4 and 1 Will. 4, and for this short reason; sect. 19 requires the provisional assignee to assign the insolvent's

Second point.

1838.  
  
 Doe  
 v.  
 Story.

estate to the creditors' assignee, but no form of conveyance is pointed out, as there is in the 11th section. But if the purposes of the act require that the same rights and interests should be conveyed to the creditors' assignee, as to the provisional assignee, there must be a necessary intendment that the form which is pointed out in one section shall be applicable to the same purposes in the other. The objects are just the same, and the differences that have been spoken of are quite immaterial.

First point.

With regard to the 11 *Geo.* 4 and 1 *Will.* 4, c. 38, it was only passed to obviate the doubts that existed as to the validity of these assignments. I doubt very much whether it could be intended that an order of court had been made in this case; but, however that may be, I think the assignment was good under the former statute.

Second point.

WILLIAMS J.—It is quite clear that nothing could pass to the creditors' assignee all that was intended to pass by the act, unless by such a form of conveyance as is given in the statute. In the case of *Moult v. Massey* (a), were there was an assignment by the provisional assignee, under the Bankrupt Act, in a conveyance not conformable to the statute, Lord *Tenterden* nonsuited the plaintiffs, and this Court confirmed the decision. Here, an assignment has been made in the form pointed out by the statute, but the question is, whether that form is good under sect. 19 as well as sect. 11. On comparing the language and objects of the two sections together, I am of opinion that it is no strained construction to say, the form prescribed applies to both sections.

First point.

On the 11 *Geo.* 4 and 1 *Will.* 4, I feel some doubt, for if we are to consider this assignment a nullity, under previous statutes, I think there ought to be distinct proof of that which is required by the 11 *Geo.* 4 and 1 *Will.* 4, to make it valid. Without, however, giving a distinct opinion upon this, I think the assignment was valid under the first act.

(a) 1 B. & Ad. 636.

COLERIDGE J.—Without looking at the late act at all, I think that this assignment was perfectly good under the 7 *Geo.* 4. At the same time, as the 11 *Geo.* 4 and 1 *Will.* 4 recites that doubts had existed as to the validity of these assignments, I have been anxious to see whether there was sufficient evidence in this case to assume that the assignment in question had been made by the order of the court, and upon the whole it seems to me there was. To consider this point, the 11 *Geo.* 4 and 1 *Will.* 4 must be put out of sight. The case then stands thus:—the provisional assignee, who has no power but under the order of the court, has made an assignment; that assignment was produced in Court, with the seal of the Insolvent Debtors' Court, which could not have been affixed except by the order of the court, and then subsequent orders of the court are produced, removing the first assignee and appointing others; I think, after all this, it is not too much to infer that the assignment was made in obedience to the order of the court. This conclusion is strengthened by the words at the end of sect. 19, for they enact, that on production of a copy of the record of the assignment, sealed with the seal of the court, no other proof of any other proceeding in the court shall be necessary, thereby dispensing with proof of any order of the court. I think, therefore, that if any doubt existed as to the validity of this assignment, under 7 *Geo.* 4, it was rendered valid by the evidence under 11 *Geo.* 4 and 1 *Will.* 4, c. 38, for the provisional assignee did no more than he was bound to do by virtue of his office.

1838.

Doz  
v.

STORY.

First point.

Rule discharged.

1838.

Friday,  
Jan. 26th.

On an issue on a clause in a charter-party, that the plaintiff on a certain day had been ready to unload a vessel, and had received *pratique*, the plaintiff proved that the port of unloading was on the coast of Africa, where no custom-house or institution for giving *pratique* existed; that he was ready to unload the vessel on that day, and that no impediment to unloading existed; the jury found that the vessel was ready to unload on the day, but had not received *pratique*:—Held, that on this issue the plaintiff was entitled to the verdict, for *pratique*, in this charter-party, meant unloading the vessel in accordance with the laws or customs of the country.

## BALLEY v. DE ARROYAVE.

**ASSUMPSIT** on a charter-party, brought by a ship owner against the freighter, to recover for eleven days' detention of the vessel above the time allowed by the charter-party. The plaintiff's vessel, the "Gil Blas," was chartered to Accra or Whidah, on the coast of Africa; and the charter-party contained the following clause:—"Ninety running days are to be allowed the said merchant (the defendant), if the ship is not sooner dispatched, for unloading and loading the ship at Accra, Whidah, or any other ports or places on the coast of Africa; to commence on arrival at Accra or Whidah, whichever may be her first ordered port of repose, being in all respects ready to unload, and having received *pratique*, and so continue whilst trading to or at any other ports or places on the coast, (casualties excepted;) and on her being finally loaded and dispatched, and ten days on demurrage over and above the said laying days, at 4*l.* 4*s.* per day.

The declaration averred that the vessel sailed from the port of London on the 20th June, and, pursuant to the orders of the defendant, proceeded to Whidah, where the said vessel, with the said goods, afterwards, to wit, on the 14th day of August, in the same year, arrived. And the plaintiff there made a right and true delivery of the said goods, agreeably to bills of lading in that behalf. Averment, that plaintiff did, by the order of the defendant, receive on board the said vessel at Whidah, and at ports on the coast of Africa, a full and complete cargo, and proceeded with the said cargo to London, according to the terms of the said charter-party. Averment, that afterwards, to wit, on the 14th day of August aforesaid, the said vessel was then in all respects ready to unload her outward cargo aforesaid, and had then received *pratique*, whereof the defendant then and there had due notice. Breach, that the defendant would not, within the said ninety running days

and the said ten days of demurrage in the charter-party mentioned, commencing on the arrival of the said vessel at Whidah aforesaid, and being in all respects ready to unload, and receiving pratique as aforesaid, unload and load the said vessel as aforesaid, although no casualties happened; but, on the contrary thereof, &c. wrongfully detained the said vessel for a long time over and above &c., to wit, eleven days, &c.; to the damage, &c.

1838.  
BALLEY  
v.  
DE ARROYAVE.

Pleas,—1, Non assumpsit: 2, That the said vessel was not ready to unload her outward cargo aforesaid, and did not receive pratique for a long time after her arrival at Whidah aforesaid, to wit, for a space of time equal to the time during which it is in the declaration alleged that the defendant wrongfully kept and detained the said vessel over and above the said running days and days of demurrage respectively: 3. That the defendant did not detain the said vessel over and above the said running days and days of demurrage: 4. Payment in accord and satisfaction.

At the trial at Guildhall, before Lord *Denman* C. J., at the sittings after Trinity term, 1836, it appeared that the plaintiff's vessel left the port of London on June 20th, and arrived at Whidah, on the coast of Africa, on the 12th August. She commenced unloading her cargo on the 14th August, and then, by the directions of a Mr. *Belarra*, the defendant's agent at Whidah, she proceeded to different ports on the coast of Africa, at which she unloaded her outward cargo, and took in a full cargo for her homeward voyage. She was finally dispatched on her homeward voyage, by *Belarra*, on the 4th December: he was pressed to dispatch her on the 2nd December, by the captain of the *Gil Blas*; but he said he could not get his dispatches ready before the 4th. When *Belarra* dispatched the *Gil Blas*, on the 4th December, he gave the captain the following certificate, indorsed on one of the bills of lading:

"I certify having received the cargo specified in this bill of lading. I also declare that the days of demurrage of the *Gil Blas* ended on the 23d November; from the said date to

1838.

BALLEY  
v.

DE ARROYAVE.

this the vessel gains, according to the agreement stipulated in the charter-party. Given at Whidah, the 4th December, 1833. *J. B. Belarra."*

It also appeared that there was no custom-house or health establishment at Whidah, nor any means or necessity for obtaining pratique. Upon these facts it was contended for the defendant, that as the second issue was on the fact of having received pratique, the verdict must be for the defendant. Lord Denman C. J. was of this opinion, and charged the jury to that effect. The jury found for the plaintiff on the first issue; on the second, they found that the vessel was ready to unload on the 14th, but that she had not received pratique; on the third issue they found that the vessel was detained ten days beyond the lay days and days of demurrage; and on the fourth they found for the plaintiff.

*Erle*, in the ensuing Michaelmas term, having obtained a rule nisi to enter a verdict for the plaintiff on the second count, or for a new trial,

Sir *J. Campbell* A. G. and *Channell* now shewed cause. The plaintiff cannot have a verdict on the second issue, for he has expressly alleged not only that he was ready to unload on the 14th August, but also that he received pratique, of which he gave no evidence, but, on the contrary, shewed that pratique was not to be had at Whidah. The plaintiff now maintains that the issue is proved, because in a barbarous country, like the coast of Africa, no sanatory establishments exist for granting pratique. This fact perhaps might furnish an answer for not complying with the terms of the charter-party, if it had been pleaded, but it does not enable the plaintiff to succeed on the issue that he has actually received it. The declaration therefore has been incorrectly framed to meet the facts.

*Erle* and *Wightman*, contra. The argument of the Attorney-General proceeds entirely on one meaning of the

word "pratique" (a). All that the clause as to pratique in the charter-party means, in the language of commerce, is, that the goods shall be unloaded as soon as the laws of the country permit. If a vessel arrives from a country, the vessels from which are required to undergo quarantine at their port of arrival before they are admitted to pratique, the custom-house officers give a certificate that pratique must be had; but if from a country where quarantine is not necessary, pratique is given immediately. It is the interest of the shipper that his goods shall be landed as soon as consists with the laws of the country; and that is the foundation of the clause. All the difficulty arises from the use of the word "receiving" instead of "having." Directly it was established to the satisfaction of the jury that the vessel was ready to unload on the 14th August, and that she might do so by the laws of the country, enough of the issue was proved to entitle the plaintiff to the verdict upon it. The rule on this subject is, "when the substance of the fact and the manner of the fact are put in issue together, if the jurors find the substance and not the manner, yet judgment shall be given according to the substance" (b). *Mackalley's* case (c) is to the same effect. If the plaintiff had only averred that the vessel was ready to unload on the 14th August, it would not have been sufficient, because it might have been that the laws of the country as to pratique would not allow her to unload till a later period. [*Littledale J.* The findings on the issues are inconsistent, for on the third issue the jury find that the vessel has been detained ten days over the ninety lay and ten demurrage days, which could not be if pratique had not been received.] They are inconsistent, but they shew what the facts of the case are. A passage from the French law shews clearly what the meaning of the word "pratique" is in the commercial world. "Les provenances, par mer, de pays habituelle-

1838.  
BALLEY  
v.  
DE ARROYAVE.

(a) *Falconer's Marine Dictionary*. (c) 9 Rep. 65 a.  
(b) *Flow. Comm.* 101.

1838.

BALLEY

v.

DE ARROYAVE.

ment et actuellement *sans*, continueront d'être admis à la libre pratique, immédiatement après les visites, et les interrogations d'usage, à moins d'accidens ou de communications de nature suspecte, survenus depuis leur départ" (a). This enactment of the French legislature shews that a vessel arriving from a healthy country is in pratique immediately, if by the law of the country there are no visits or inquiries necessary to be made.

LORD DENMAN C. J.—I thought at the trial that the plaintiff could not recover on the face of the second issue as it stands; but I am now convinced that the correct meaning of the word "pratique," contained in a charter-party like the present, with respect to a country like Africa, is that which has been given to it by the counsel for the plaintiff, and therefore that he is entitled to the verdict on that issue.

LITLEDALE J.—I think "pratique" in this charter-party means the moment the vessel begins to unload her cargo at her outward port, and that as soon as a vessel is allowed to unload by the laws or customs of the country, she may be said to have "pratique."

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute to enter a verdict for the plaintiff on the second issue.

(a) Repertoire de Jurisprudence, par Merlin, tit. Quarantine, tom. 26, p. 160.

1838.

The QUEEN v. The Mayor, Aldermen, and Burgesses  
of POOLE.

Monday,  
January 29th.

**BINGHAM**, in Michaelmas term last, had obtained a rule, calling upon the town council of Poole to shew cause why a writ of mandamus should not issue, directed to them, commanding them to execute a bond, under the common seal, conditioned for the payment to *Francis Edwards*, of the yearly sum of 42*l.* 9*s.* 10*d.*

It appeared by the affidavit of *Mr. Edwards*, that he was appointed in Feb. 1835, to the office of collector of certain duties on goods and merchandize imported into and exported out of the port of Poole, and also on ballast and tonnage payable in respect of vessels coming into and going out of the harbour. On the 14th Jan. 1836, he received a letter from the town clerk, informing him that the town council had removed him from the office of collector of quay dues, and had appointed *Mr. Adey* in his stead. *Mr. Edwards* thereupon made a claim to the town council for compensation, which they rejected. *Mr. Edwards* then memorialized the Lords of the Treasury, who, on the advice of the law officers of the crown, awarded *Mr. Edwards* an annuity of 42*l.* 9*s.* 10*d.* The town council refused to obey this order.

By the affidavits in answer, it was stated that the appointment of *Mr. Edwards* was made under a local act of parliament (a), whereby the mayor, bailiffs and burgesses, were authorized to appoint a person to collect the duties, and also from time to time to remove and displace such collector; that previous to the appointment of *Mr. Edwards*, the

1. Where the Lords of the Treasury award compensation to an officer in a borough, on his being removed from office by the town council, if the office is not a borough office, or the removal is not made under the 5 & 6 Will. 4, c. 76, the Lords of the Treasury have no jurisdiction.

2. In the borough of P. a local act empowered the mayor and corporation to appoint certain officers, (amongst them a quay master,) and also to displace them from time to time, and to assign them salaries out of the wharfage dues collected under the act. The remainder of the dues collected was

(a) See the provisions of this case, stated in the judgment of the act (29 Geo. 2), bearing on this Court, *post*, 123.

appropriated by the act to the harbour of P. The town council elected under the 5 & 6 Will. 4, c. 76, who, by sect. 72, are made trustees for executing all acts relating to the borough, having displaced a quay master appointed before the Municipal Act:—Held, that he was displaced under the local act, and therefore was not entitled to compensation as an officer displaced under the Municipal Act.

*Quere*, Whether the office of quay master, the salary of which arose from the dues collected under the local act, is a borough office.

1838.  
  
 The QUEEN  
 v.  
 Mayor &c. of  
 POOLE.

mayor, bailiffs and burgesses had, in exercise of the powers given them by the local act, removed, as occasion required, such collectors of rates, without any compensation ever having been paid or demanded; that although the appointment of a collector, previous to the 5 & 6 Will. 4, c. 76, vested in the mayor, bailiffs and burgesses, and since that act vested in the mayor, aldermen and burgesses of the town, yet the management of the dues, and the payment of officers, had been, from the passing of the local act, and still is, under the management of a body called the Quay Committee, who keep a separate fund called the Quay Fund, and pay out of it all the officers appointed under the act, over which the corporation have no control, except for the purposes of the local act; that this fund cannot be applied to corporate purposes, and that the corporation of Poole had borrowed sums of money, at interest, from the quay committee; that the borough fund was not applicable to the payment of the salaries under the local act, and that at the audit of the corporation funds, the quay fund has never been included. It was then stated, that the office of collector of quay dues was not a corporate office, and that Mr. *Edwards* was not removed under the 5 & 6 Will. 4, c. 78, but under the local act, being nearly seventy years of age, and subject to the gout.

Sir *W. W. Follett* and *Barstow*, on a former day in this term, shewed cause. The Lords of the Treasury were wholly without jurisdiction in this case, and therefore their order was void. Mr. *Edwards* was not an officer of the corporation, and he was not removed under the Municipal Corporation Act. The local act authorizes the mayor, &c. to nominate and displace officers at will, and this power has been often exercised. The funds arising from the quay dues have always been distinguished from the corporation funds; and the corporation not having any control over the quay fund, have no other means of making compensation but out of the borough fund. The corporation hold those dues as

trustees, under sects. 72 and 73 of the Municipal Corporation Act, which is quite distinct from the corporate property they hold as a corporation. Under what section then can this officer claim compensation? Sect. 66 only applies to offices abolished, or to persons removed under the act. *Mr. Edwards* was removed by the new trustees under the local act, and there is no ground for supposing that the trustees were more fettered in their appointments than before. The Lords of the Treasury and this Court, in *Rex v. Bridgewater (a)*, have put a liberal construction upon the word "office," but that construction was only intended to include corporate offices, which were not strictly legal or permanent offices, not to comprehend offices quite unconnected with the corporation. *Rex v. Bridgewater (a)* also establishes, that if the Lords of the Treasury have no jurisdiction, their order is a nullity. On the grounds, therefore, 1st, that *Mr. Edwards* was not a corporate officer; and 2d, that he has not been removed under the 5 & 6 Will. 4, c. 76, this rule must be discharged.

1838.  
  
 The QUEEN  
 v.  
 Mayor &c. of  
 POOLE.

Sir *J. Campbell* A. G. and *Bingham*, contra. The question is, whether the order of the Lords of the Treasury is a nullity altogether; for if they had any jurisdiction, sect. 66 of the Municipal Act provides that this order "shall be binding on all parties." In *The King v. The Mayor of Bridgewater (a)*, the claim for compensation was made by *Mr. Trevor* as clerk to the justices; and *Coleridge J.* said, "Before the act, he (*Mr. Trevor*) was an officer of the borough without doubt." But what is the office of a clerk to the justices; it has nothing to do with the corporation, and requires no formal appointment or removal. The Court however held, that it was an office within the meaning of the act, for which compensation should be awarded. *Mr. Edwards's* office was much more nearly connected with the corporation. The dues collected under the local act are corporate property. That act does not create the dues,

(a) 1 N. & P. 466.

1838.  
 The QUEEN  
 v.  
 Mayor &c. of  
 POOLE.

it only specifies and declares what they are; the dues are without doubt grants from the crown, similar to what is found in most seaport towns. In one sense the corporation are trustees, for no doubt they would be liable to indictment if they did not keep the quay and port in repair, but in every other view the dues formed part of the corporation property. Suppose *Edwards* had been a collector of the town dues before the act passed, can there be any doubt that he would have been entitled to compensation? The destination of these dues is relied upon, namely, that all is to be expended on the harbour &c., but that was always the case, impliedly, before the local act made an express provision on the subject. [*Coleridge J.* Do you contend that if no statute had been passed, directing the application of these funds, that it would have been any breach of duty in the corporation, at common law, to apply them to other purposes?] The corporation, no doubt, would have applied them for the purposes mentioned in the act; but as that act recognizes that the dues belong to the corporation, whatever surplus there might be after repairing would accrue to them. However that might be, Mr. *Edwards* held an office of profit under the corporation, and he has been removed, and therefore he comes completely within the third category of sect. 66, as an officer of a borough, who has been removed from his office under the provisions of the act. No incapacity on his part, or cause for removal, is alleged. The principal ground relied on for resisting this application is, that these dues have always been managed by a committee, but a committee of the corporation is tantamount to the corporation for the purposes for which they are appointed, just as an officer appointed by a committee of the House of Commons, is an officer of the whole House. It is an assumption that the committee in the corporation are trustees with regard to these dues, and there is no analogy between them and eleemosynary trusts, which are created by private individuals. Wherever these dues exist, they exist by prescription.

*Cur. adv. vult.*

Lord DENMAN C. J., on this day delivered the judgment of the Court as follows :—Upon the argument of this case, we had no doubt that the party applying for this mandamus was an officer within the meaning properly to be given to that term in the compensation clause of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 66, but we were desirous of considering whether, upon the affidavits, he was an officer of the *borough of Poole*, and had been removed from his office *under the provisions of the act*. If we should be satisfied that the affirmative of both these propositions was established, we had no doubt that the Lords of the Treasury had the exclusive jurisdiction to determine on his right to compensation, and it would be then our duty to enforce by mandamus obedience to the award they have made; but if either of those propositions be decided in the negative, it would be equally clear that their lordships have not given, and of course cannot give themselves jurisdiction. It is recited by the local act, 29 Geo. 2, that the *mayor, bailiffs, burgesses and commonalty*, (i. e. the whole body corporate of Poole,) had immemorially received certain duties, called petty customs or wharfage, and also certain other duties, called broomage and ballod duty, which had been constantly under the management of the *mayor, bailiffs and burgesses*, as trustees and managers; that the said duties had been applied for the repair of the harbour, quays and wharfs, and other works necessary for the more convenient use of the same. Difficulties in the collecting and enforcing the payment of these duties are then recited, and for the remedy it is enacted that certain specified duties shall henceforth be paid to the mayor, bailiffs, burgesses and *commonalty*, as well by the said mayor, bailiffs, burgesses and *commonalty*, in their natural capacities, as by all other persons, under the circumstances in the act stated. And power is given to the *mayor, bailiffs and burgesses*, or the major part of them for the time being, whereof the mayor is to be one, to assemble, and by any writing *under their hands, or the hands of the major part of them so assembled*, to appoint certain officers, (amongst others a

1838.

The QUEEN  
v.  
Mayor &c. of  
POOLE.

1838.

  
 The QUEEN  
 v.  
 Mayor &c. of  
 POOLE.

quay master,) and also from time to time to displace or remove them, and to assign them reasonable salaries out of the said duties, *collected by virtue of the act*, not exceeding 2s. in the pound. The act then provides for the manner of collecting the duties and auditing the accounts, which it gives each person, out of whose goods any payment has been made, a right to examine; and lastly, it specifically directs the application of all the monies to be raised by the said duties, to the repair and good order of the harbour, wharfs, quays, and other works connected with them. Under this act Mr. *Edwards* received his appointment as quay master, and very shortly after the election of the town council, under 5 & 6 Will. 4, c. 76, was by them dismissed from his office. It was urged upon us in support of the rule, and we think correctly, that the compensation clause of this act ought to receive a liberal construction. Upon this principle, in the case of *The Mayor of Bridgewater* (a), when we found that the duties and emoluments of clerk to the charter justices had always been incident to the office of common or town clerk, which was clearly an office of profit within and belonging to the borough, we thought ourselves justified in holding that the compensation for the loss of that office, as it existed before the passing of the statute, ought to embrace such emoluments; for the employment of clerk to the justices had become, by long usage, parcel of the corporate office of town clerk, and the applicant, in that case, who had been appointed town clerk by the new corporation, but was not the clerk to the new borough justices, appeared to us not to have been reappointed to his former office, and to have received only a partial compensation for the loss of it. Before, however, we can authorize a charge upon the borough fund, we are bound to see that the case of the applicant is brought fairly within the conditions of the statute. Upon a consideration of the authority by which Mr. *Edwards* was appointed, and the fund from which his salary was paid, we have entertained great doubts, whether he

(a) 1 N. & P. 466.

could be properly considered an officer of *the borough*. It is unnecessary however to determine that question, because we are of opinion that he has not been removed under the provisions of the statute in question. By the 72d section of the statute, the new body corporate are made trustees for executing, by the council of the borough, the powers and provisions of all acts of parliament relating to the borough, made before the passing of the act, other than any act made for securing charitable uses, &c. Under this section the council become substituted in the local act for the mayor, bailiffs and burgesses; they have the same powers, and no greater; they must administer the local act, but are bound by it. If therefore Mr. *Edwards*, under the local act, had been appointed for life, no provision of the 5 & 6 Will. 4, c. 76, would have enabled the council to remove him. They are enabled so to do only because under the local statute he was appointed to hold during pleasure, and because they are now appointed as trustees to execute the powers and provisions of that statute. The removal, therefore, is an act done by them as such, and in virtue of the powers of that statute, and is not a removal under the provisions of the 5 & 6 Will. 4, c. 76. We are not satisfied upon the affidavits, that the removal of Mr. *Edwards* has been made without just cause; unexceptionable reasons were stated for it upon the argument, but without deciding that which is not properly of our jurisdiction; we may add, that we have come to our conclusion with the less regret, because it seems clear that those dues, out of which his salary was paid, do not become a part of the borough fund, and therefore there would be almost an injustice in making that fund chargeable with any compensation for the loss of it. Upon the ground, however, that he has not been removed under the provisions of 5 & 6 Will. 4, c. 76, we think this rule must be discharged.

Rule discharged.

1838.  
  
 The QUEEN  
 v.  
 Mayor &c. of  
 POOLE.



1838.

*Monday,  
January 29th.*

The QUEEN v. The Wardens, Overseers and Inhabitants  
of ST. SAVIOUR'S, SOUTHWARK.

1. Where the return to a mandamus is not frivolous on the face of it, its validity must be argued on a concilium, and not on a rule for quashing the return.

2. *Jac. 1*, by letters-patent, granted the rectory of St. S. to certain persons and their heirs in trust for the wardens of St. S., enjoining them, out of the revenue thereof, to maintain two chaplains, and to repair their parish church, and to pay the chaplains certain salaries. By a local act, reciting these

**MANDAMUS.** The writ recited, that by 22 & 23 Car. 2, intituled "An Act for making the Manor of Paris Garden a parish, and to enable the parishioners of St. Saviour's, Southwark, to raise a Maintenance for Ministers and for Repairs of their Church," it was recited, that *James the First*, by his letters-patent, granted the rectory and parsonage impropriate of the parish church of St. Saviour's, Southwark, to certain persons and their heirs, in trust for the wardens of the said parish church and their successors, enjoining them, out of the revenue thereof, to find and maintain two preaching chaplains, and a schoolmaster and usher for their free grammar school, and to repair their parish church, and to pay their chaplains threescore pounds per annum, and their schoolmaster and usher thirty pounds per annum. But the said parish church being a very great church, and very chargeable to be maintained in due reparation, and the revenue of the said rectory not amounting to above 100*l.* per annum, *communibus annis*, the sum would not extend to repair the said church, and to allow any reasonable maintenance to the said chaplains; for the remedy whereof it is, amongst other things, enacted, that all the

letters-patent, and that the parish church was very chargeable, and the revenue did not extend to repair the church and allow any reasonable maintenance to the chaplains, it was enacted that the inhabitants of St. S. should be discharged from tithes, and that in consideration thereof the wardens, with six of the inhabitants, might make a rate every year, and that the wardens should pay to the chaplains certain salaries, which should be in lieu of all salaries to be paid under the letters-patent, and all the residue of the rate to be applied to the repairs of the church. A subsequent local act directed that the rate should be made by the wardens, overseers of the poor, and other inhabitants of the parish, in vestry assembled; and that out of the rate so collected, the wardens should pay the salaries, &c., and apply the remainder to the repairs of the church. The inhabitants having refused to make a rate under this act, and the salaries of the chaplains being unpaid, and the church out of repair,—the Court directed a mandamus to the wardens and inhabitants to make a rate:—Held, that the rate was rightly directed, as the wardens had no power to make a rate alone.

3. The return of the inhabitants stated that the wardens were liable, on their covenant in the letters-patent, to pay portion of the salaries, and to repair the church, and that they had sufficient yearly revenue for that purpose, the rate being only intended to be a rate in aid:—Held, that whatever might be their liability or their revenue, as to the church repairs, the acts of parliament give the rate to the chaplains as the only fund for payment of their salaries, and in lieu of all other.

parishioners of St. Saviour's, and all the inhabitants of and within the same, should be for ever thereafter exonerated and discharged from tithes; and in consideration thereof, that it should and might be lawful to and for the churchwardens for the time being of the said parish, and the overseers of the poor, or the greater number of them, on giving notice unto or calling together six or more of such inhabitants as had, within the space of seven years then last past, borne the like office therein, to assemble yearly, and make a rate, not exceeding 350*l.* in any one year; and the wardens of the said parish church, and their successors, should, by yearly quarterly payments, pay yearly for ever unto each of the chaplains the yearly sum of 100*l.*, and unto the schoolmaster and usher the yearly sum of 30*l.*; which said several sums should be in lieu of all monies to them respectively payable or to be paid by virtue of the said letters-patent or any appointment therein; and all the residue of the monies so to be raised as aforesaid should from time to time be applied and disposed of for and towards the repairs of the said parish church of St. Saviour's, and other matters concerning the administration of the same church affairs, in such manner as the said wardens for the time being should conceive meet. The writ then recited, that by 56 *Geo. 3*, c. *lv.* (local), it was, amongst other things, enacted, that so much of the act of *Car. 2* as respected the amount of the rate to be raised by rate should be repealed, and enacted that it should and might be lawful for the wardens, overseers of the poor, and other inhabitants of the said parish in vestry assembled, to make a rate yearly, not exceeding one shilling in the pound; and all such sums as should be paid by the collectors, to be applied as hereinafter mentioned; that is to say, the wardens should, by equal quarterly payments, pay yearly unto each of the chaplains the yearly sum of 300*l.*, and unto the schoolmaster and usher the yearly sum of 30*l.*, the payment of which sums should be in lieu of all monies to them respectively payable or to be paid by virtue of the said letters-patent or any appointment therein; and all the residue of the monies so to be raised as aforesaid should,

1838.

The QUEEN  
v.  
The Wardens,  
&c. of  
ST. SAVIOUR'S,  
SOUTHWARK.

1838.

  
 The QUEEN  
 v.  
 The Wardens,  
 &c. of  
 ST. SAVIOUR'S,  
 SOUTHWARK.

from time to time, be applied and disposed of for and towards the repairs of the said parish church, and other matters concerning the administration of the same church affairs, in such manner as the said wardens for the time being should conceive proper, as by the said act, reference being thereto had, will more fully appear. The writ then recited that there was due and owing to the chaplains 150*l.* each, and to the schoolmaster and usher 30*l.*; and also that the church of St. Saviour's was in a very dilapidated state, and required immediate repairs, and that application had been made to the wardens for payment of the sums so owing, which they neglected and refused to pay; and also that application had been made to the wardens, overseers and inhabitants, to make a rate for the purposes aforesaid, in pursuance of the said acts of parliament. The writ then commanded the wardens, overseers and inhabitants of the said parish, immediately after the receipt of the writ, to assemble a vestry, and make a rate for the purposes in that behalf aforesaid, in pursuance of the said acts of parliament, or to shew cause to the contrary thereof.

The wardens and overseers, and some of the inhabitants, made a return to the writ, in which they admitted that the stipends were due to the chaplains, and that the church was dilapidated; and stated that at the time of the application to them for payment, they, the wardens, were and still are unable to pay the said sums or any part thereof, by reason that the said wardens, at the time of such application, had not, and still have not, in their custody and control, any sum or sums of money assessed, collected or paid, under or by virtue of the 22 & 23 *Car.* 2, c. ii. and of the 56 *Geo.* 3, or either of the said acts, or otherwise howsoever. They then certified that they refused to make a rate, as they lawfully might, under the two acts, and also because any rate to be made under the said acts might be made by the wardens and overseers, and six or more of the inhabitants, alone.

A separate return was made by other of the inhabitants, in which they stated, that by letters-patent of *Hen.* 6, certain parishioners of St. Margaret, Southwark, were incorporated

by the name of "The Wardens of the Guild of our blessed Lady," with power to purchase lands in mortmain; and that, by the 28 *Hen.* 8, the parishioners of St. Margaret's were incorporated as "The Wardens of the parish church of St. Margaret," with a similar power to purchase lands; that by the 32 *Hen.* 8, the parishes of St. Margaret and St. Mary Overy were united, and it was enacted that the parishioners should elect churchwardens every year, who should be a body corporate, and who should have all the lands, tenements, hereditaments, and other revenues, at any time in the possession of the wardens of St. Margaret and St. Mary Magdalen Overy. They then certified that *Jac.* 1, by his letters-patent, granted the rectory of St. Saviour's and all the premises and hereditaments, formerly parcel of the priory of St. Mary's Overy, to the wardens of St. Saviour's; and the said last-mentioned wardens did covenant with his Majesty that they would, at their own proper costs and charges, maintain one learned man to the place of schoolmaster, and one other learned man to the place of usher, and should pay 20*l.* a year to the schoolmaster, and 10*l.* a year to the usher; and the said wardens did further covenant that they would maintain two chaplains, and would pay yearly to the said chaplains 60*l.*, and would pay all other charges, expenses and sums of money, out of the said rectory of ancient time issuing or to be paid; and his said Majesty, his heirs and successors, therefrom and from every part thereof, from thenceforth for ever would acquit, exonerate and keep harmless.

The inhabitants then averred that the charge of repairing the parish church was a charge out of the said rectory of ancient time issuing, and the divers messuages, lands and tenements, granted, conveyed, purchased and procured by the said wardens, under and by virtue of the said divers letters-patent and acts of parliament before mentioned, were of large annual value, to wit, of the value of 1000*l.* and upwards per annum, which said sum of 1000*l.* is amply sufficient year by year to repair the said church, and to pay the said stipends in the letters-patent of *Jac.* 1 mentioned.

1838.  
  
 The QUEEN  
*v.*  
 The Wardens,  
 &c. of  
 ST. SAVIOUR'S,  
 SOUTHWARK.

1838.  
 The QUEEN  
 v.  
 The Wardens,  
 &c. of  
 St. SAVIOUR'S,  
 SOUTHWARK.

They then averred that the wardens were primarily liable to pay the stipends in the said letters-patent mentioned, and to repair the church, and that the object and intention of the 22 & 23 *Car.* 2, and the 56 *Geo.* 3, was to enable the parishioners of St. Saviour's to make a rate in aid of the said primary liability, and that the wardens had always paid the stipends and repaired the church up to June, 1836. The inhabitants then set out the proceedings at the vestry assembled in pursuance of the writ, in which an attempt was made by the inhabitants to appoint a committee, and consider the proper return to be made to the rate, and that a rate of sixpence in the pound was proposed, which was more than sufficient for the purposes mentioned in the act, and therefore the majority voted against it.

Sir *F. Pollock*, in Trinity term, having obtained a rule nisi to quash these returns,

Jan. 18th.

Sir *J. Campbell* A. G. (with whom were *M. D. Hill* and *E. Perry*), on a former day in this term, shewed cause; and contended that this rule must be discharged, as there was nothing frivolous in the returns made, but serious questions of law raised for the consideration of the Court. It ought therefore to have been brought on in the usual course, upon a concilium, that the decision of the Court may be had in a formal manner, and an opportunity for bringing error be afforded.

Sir *F. Pollock*, *contra*. This being an urgent case, and the stipends being unpaid, it was thought that the points of law might be argued on the rule, in order to obtain the speedier decision of the Court.

LORD DENMAN C. J.—When a return raises matters of law, it cannot be quashed on a motion, but must come on in a regular way upon a concilium (*a*).

A concilium being obtained, the case was set down in the crown paper, and was argued on this day by

Sir *F. Pollock*, for the crown. Neither of these returns

(*a*) See *Regina v. Payn*, *post*.

can be sustained. The wardens seem merely to rely on the power which they contend they have to make the rate themselves, under the 22 & 23 *Car.* 2; but that construction cannot be supported, for the 56 *Geo.* 3 enacts, that the wardens, overseers, and other inhabitants of the parish, in vestry assembled, shall make the rate. They then contend, as the inhabitants do in their return, that under the two acts they have a discretionary power to make the rate. The inhabitants in this return rely on the covenant by the wardens, contained in the letters-patent of *Jac.* 1. The effect of those letters-patent was to convey the rectory of St. Saviour's to the wardens, who thereupon covenanted to pay the stipends and repair the church; but, by the 22 & 23 *Car.* 2, the inhabitants of St. Saviour's were exonerated from tithes, which constituted the revenue of the rectory, and *in consideration* thereof it was enacted that it should and might be lawful for the wardens to make a rate, and out of it to pay the chaplains; and it was expressly enacted, that the payments so to be made to the chaplains should be *in lieu* of all monies payable to them out of the letters-patent. The chaplains therefore have no claim on the wardens under the letters-patent of *Jac.* 1. The inhabitants certify that the revenue of the wardens year by year, is sufficient to pay the stipends year by year, but they carefully abstain from saying that the wardens have sufficient funds in hand now. The question therefore is, are the wardens, overseers and inhabitants compellable to make a rate under these statutes, or have they it in their discretion to refuse whenever they choose. The law is, that wherever a public duty is pointed out by the legislature, this Court will enforce it; *Bac. Abr.* Statutes (I.); and it is immaterial what the words enjoining the duty are, for the Court will construe the word *may* as the word *shall*. Thus, on the 14 *Car.* 2, c. 12, which enacts that the churchwardens and overseers *may* make a rate to reimburse the constables, the Court held that they were compellable to do so (a). So, on the 23

1838.  
  
 The QUEEN  
 v.  
 The Wardens,  
 &c. of  
 ST. SAVIOUR'S,  
 SOUTHWARK.

(a) *Rex et Regina v. Parlow*, 2 Salk. 809.

1838.

The QUEEN  
v.  
The Wardens,  
&c. of  
ST. SAVIOUR'S,  
SOUTHWARK.

*Hen. 6*, which enacts that the sheriff may take bail, the construction has been that he shall do this; *Bac. Abr. Statutes* (I.) This doctrine was approved of in *Rex v. The Commissioners of Flockwold Inclosure* (a); and in a case in this Court against the commissioners of a metropolitan paving act, where a discretion was given them as to lighting certain streets or not, the Court was divided whether, even with this discretionary clause, they were not compellable to do so. But there was no doubt expressed that they would have been compellable but for this clause. So, on the 8 & 9 *Will. 3*, which directs that breaches may be assigned or suggested, the Courts have held the statute to be compulsory. What is there to distinguish the present case from the *Case of the Constables in Salkeld* (b)? The object of the act of *Car. 2* was to relieve the inhabitants of St. Saviour's from the payment of tithes, and in lieu thereof to impose upon them the burden of paying the stipends and of repairing their church. A public duty therefore is enjoined them, which this Court will enforce.

*Hindmarsh*, contra, for the wardens. The writ in this case is misdirected, for under these acts the wardens and overseers, with six or more of the inhabitants, had power to make the rate alone. They had so clearly under the 22 & 23 *Car. 2*; and although the 56 *Geo. 3*, c. lv, s. 3, enacts that the rate is to be made by the wardens, overseers, and other inhabitants of the parish in vestry assembled, the word "inhabitants" there cannot mean the inhabitants at large, but must mean the inhabitants spoken of in the 22 & 23 *Car. 2*. If it means the inhabitants at large, the insertion of the words "wardens and overseers" would be idle and unnecessary: following those words, the meaning must be restricted to a smaller class, according to the decision of this Court in *Sandiman v. Breach* (c), and *Kitchen v. Shaw* (d).

(a) 2 Chit. Rep. 253.

(c) 7 B. &amp; C. 96.

(b) *Rex et Regina v. Barlow*,

(d) 1 N. &amp; P. 791.

2 Salk. 609.

1838.

The QUEEN  
v.  
The Wardens,  
&c. of  
St. SAVIOUR'S,  
SOUTHWARK.

Sir *J. Campbell* A. G., for the inhabitants. It is not disputed that the chaplains' stipends ought to be paid, and the church repaired; but the question is, whether the wardens, having sufficient funds for that purpose, are not liable, and whether these acts contemplate more than a rate in aid of the wardens' primary liability. The wardens having divers large estates by the bounty of the legislature and of former sovereigns, are bound, by their express covenant in the letters-patent of *Jac. 1*, to bear these charges. [Lord *Denman* C. J. Are there not sufficient facts stated on this return to enable the prosecutor to traverse them? Sir *F. Pollock*. They do not state any facts which shew that there is a fund applicable to those purposes; and, secondly, if there be such a fund, the acts expressly direct that the payments shall be in lieu of the payments made out of it.] Undoubtedly sufficient facts are shewn on the return; but first of all it is contended that the writ is bad. It does not appear by the writ that the wardens had no funds in hand out of which to pay these salaries: they might have had sufficient funds out of a former rate. There has not therefore been a sufficient refusal: *Rex v. The Margate Pier Company* (a). Again, the mandamus should have been to the wardens to pay the money, and not to make a rate. It appears by the writ, and by the 22 & 23 *Car. 2*, and the 56 *Geo. 3*, which are public acts, that the wardens had a revenue from the rectory besides the tithes, which were given up. By the preamble of the latter act, it is stated that the revenue of the wardens arising out of the rectory, and the rate they were enabled to raise by rate under 22 & 23 *Car. 2*, was insufficient, &c., and then proceeds to give powers to raise an additional rate. But there is nothing to shew that that revenue may not have greatly increased, and be quite sufficient now without a rate; and it is quite consistent with the writ that the wardens may have 5000*l.* in hand, arising out of their rectory, at the moment of the writ going. That being so, as they are bound by their covenant

(a) 3 B. &amp; Ald. 290.

1838.

The QUEEN  
v.  
The Wardens,  
&c. of  
ST. SAVIOUR'S,  
SOUTHWARK.

in the letters-patent, *Henley v. The Mayor of Lyme Regis* (a), and may have sufficient funds to meet the charges, there is no ground for casting the liability elsewhere. All that the acts say is, that the wardens *shall pay* the salaries, and appropriate the residue to church repairs. It is clear that this enactment was meant to be auxiliary in the one instance to the liability of the wardens, and in the other to the usual fund for repairing a church. If the church requires repair in this parish, a church-rate may be made in the usual way. It is not contended that this case comes within *Rex v. St. Peter's, Thetford* (b), or that if a statute enacts that a church-rate shall be made, that this Court will not enforce the enactment; but it is submitted this clause was not intended to be compulsory. As to the provision for the payments to be made by the wardens, being in lieu of what the chaplains were to receive under the letters-patent of *James*, that enactment was only to prevent any claim for the salaries being made twice. The writ therefore is defective, in not shewing that there were no funds in the hands of the wardens.

But if it does not appear clearly on the face of the writ that the wardens are liable, and have sufficient funds, these facts are broadly stated on the face of the return. Their liability is charged in direct terms, and they are said to have a yearly revenue of 1000*l.* and upwards. If these allegations are false, they should be traversed. It is objected that the return does not aver that the wardens have sufficient funds in their hands now; but that is a fact entirely out of the knowledge of the inhabitants. The return of the wardens must convince the Court that they have sufficient funds; for the only reason they give for refusing to pay the rate is, merely that they had no funds in hand *assessed* under the two acts, or either of them, or otherwise howsoever. How then can the Court, since the fact of there being funds in the wardens' hands is admitted, and

(a) 5 Bing. 91, confirmed on error in K. B., 3 B. & Ad. 77, and in the House of Lords, 1 Scott, 291; S. C. 1 Bing. N. C. 222.

(b) 5 T. R. 364.


their legal liability thereupon is indisputable, according to *Henley v. The Mayor of Lyme Regis* (a), quash this return? The cases cited to shew the Court will read *may* as *must*, when the policy of the law requires it, are fully admitted; but it is urged that the whole context and spirit of the acts shew, that the rate in question was only to be one in aid of a primary fund. It must be conceded that some discretion is given to the inhabitants as to the amount of a rate: they cannot be compelled always to make a shilling rate. Then what can determine the amount of the rate to be made, except the extent of the primary fund?

1838.  
  
 The QUEEN  
 v.  
 The Wardens,  
 &c. of  
 St. SAVIOUR'S,  
 SOUTHWARK.

Sir F. Pollock, in reply. It does not at all appear that there is any primary fund; and if there were, it would not prevent this writ issuing. The inhabitants can always inform themselves of what funds are in the wardens' possession; for sect. 5 of 56 Geo. 3 provides that the wardens shall every year give an account to two justices of the monies expended by them, and of the application of all funds received by them. If the inhabitants had made a rate to defray the stipends, then their return as to the wardens' liability, and the Attorney-General's argument, would have been probably good; for as only the residue of such rate is to be applied to the church repairs, it would be difficult to devise a mode for increasing the residue: but as to the stipends to the chaplains and the schoolmaster, the legislature has expressly provided this fund, raised by rate, for them. [Coleridge J. Your argument is, that though there may be a primary fund, the chaplains have a right to be paid out of a rate to be raised for the purpose; but if so, how is that primary fund to be applied?] There may be a difficulty in answering that question; probably an act of parliament might be required. But the legislature, as if to guard against such difficulties, have expressly provided that the wardens shall pay these stipends quarterly out of the rate. Sect. 5, of 56 Geo. 3, c. lv., therefore is relied upon.

(a) 3 B. & Ad. 77; 1 Scott, 77; 1 Bing. N. C. 222.

1838.

  
The QUEEN  
v.  
The Wardens,  
&c. of  
ST. SAVIOUR'S,  
SOUTHWARK.

The words there are as compulsory as words can be—"the wardens *shall pay*," &c.—and the payments so made shall be in lieu of all monies respectively payable to them under the said letters-patent. Two objections are relied upon for the inhabitants; first, that the writ is bad, in not shewing that the wardens had no funds; secondly, that the return is a good one. Undoubtedly, if the opinion of the Court is in favour of the return, it would be more desirable for the prosecutor to have the writ quashed, than to have the return allowed a good one. In the former case a new writ might be brought; but if the return is a good one, then the statutes are wholly useless. But it is submitted that a sufficient refusal and denial of means by the wardens is shewn on the face of the writ.

The proposition contended for by the wardens, that they alone have the power to make the rate, cannot be maintained. [The *Court* intimated he need not trouble himself upon this point.]

*Cur. adv. vult.*

Lord DENMAN C. J., on this day delivered the judgment of the Court as follows:—

This was a mandamus, which had issued at the prayer of the two chaplains, schoolmaster and usher of St. Saviour's, Southwark, commanding the defendants to make a rate for the payment of certain salaries, to which they claimed to be entitled under the 22 & 23 *Car.* 2, and 56 *Geo.* 3, c. lv. Two returns were made; and upon the argument it was conceded, that if the mandamus were properly directed, and if the rate spoken of in those acts were the primary fund for the payment of the salaries in question, then the writ was good, and the returns insufficient, and that a peremptory mandamus, if necessary, ought to issue; the Attorney-General, for the inhabitants, properly conceding that these salaries ought to be paid. We had no doubt upon the argument that the mandamus was properly directed; and upon consideration, we are of opinion that the primary fund, to which the chaplains, schoolmaster and usher are by law to

look for their salaries, is a rate to be made annually under the provision of the 56 *Geo. 3*, c. lv. s. 5, without reference to arrears, if any, of any former rate, or to any other fund in the hands of the churchwardens. It is not necessary, for the purposes of this case, to inquire into the history of this parish earlier than the reign of *James 1*; for there is no evidence whatever, on the face of the mandamus or return, or to be collected from the two statutes above mentioned, that there exist any funds appropriated at any earlier period to the purposes now in question. It appears that the monarch last named, by his letters-patent, granted the rectory and parsonage impropriate to certain persons and their heirs, in trust for the churchwardens and their successors, enjoining them, *out of the revenue thereof*, to find and maintain two preaching chaplains, and a schoolmaster and usher, and to pay the two former 60*l.* and the two latter 30*l.* per annum. The revenue of the rectory was therefore the original fund for the payment of these stipends; but in the 22 & 23 *Charles 2*, an act passed on account of the inability of providing for these stipends and the repairs of the parish church out of this fund. This act therefore exonerated the parishioners from all tithes; thereby, in great measure, drying up that original source, and *in consideration thereof* substituting a rate, which it empowered the wardens and overseers, calling together six inhabitants with a certain qualification mentioned, to make and settle yearly, for the purpose of raising a sum not exceeding 350*l.* It then directs the wardens to pay each of the chaplains the yearly sum of 100*l.*, the schoolmaster 20*l.*, and the usher 10*l.*, which said several sums (it declares) so to be paid to them respectively as aforesaid, shall be in lieu of all monies respectively payable by virtue of the said letters-patent. It is clear, under this provision, that without reference to the tithes, which were extinguished, or to any other source of income derivable under the letters-patent of king *James*, the chaplains were thenceforth entitled to receive the sums specified, primarily, from a rate, which rate must be raised annually, because no arrears were to accumulate in the hands of the

1838.

The QUEEN  
v.  
The Wardens,  
&c. of  
ST. SAVIOUR'S,  
SOUTHWARK.

1832.

The QUEEN  
v.The Wardens,  
&c. of  
ST. SAVIOUR'S,  
SOUTHWARK.

wardens—all the residue beyond the amount of the salaries being appropriated, by the same clause, to the repairs of the church.

In this state things continued till the 56 *Geo. 3*, c. *lv.* when an act passed, which,—after reciting the former enactment, and also that the sum allowed to be raised by it, and *the revenue of the rectory* under the management of the wardens, were inadequate to the repairing of the church, and increasing the stipends paid to the chaplains, “which are now inadequate and ought to be increased,” and that it was expedient to give power for raising additional rates for those purposes,—repealed so much of the said act as respects *the amount* of the sum to be raised by rate.

It was contended, upon this recital, that it disclosed a *revenue of the rectory* still existing under the management of the wardens, though the tithes were extinct, and that the proceeds of this revenue ought to be accounted for and exhausted before any rate was raised. This recital is, no doubt, evidence of the existence of a revenue; but that seems to us immaterial—for the chaplains, schoolmaster and usher, have no claim upon it, whatever may be its amount,—to what purposes it is to be applied, beyond the repairs of the church, or what is its amount, we are not now called upon to examine. Such an inquiry, if thought desirable, may be instituted elsewhere, and at another time, but it is foreign to the present discussion. The 3rd section then provides for an annual rate, to be made by the wardens, overseers and other inhabitants in vestry assembled, not exceeding one shilling in the pound; and, lastly, the 5th section enacts, that the sums so raised shall be thus applied, that is to say, the wardens shall, by equal quarterly payments, pay yearly for ever 300*l.* to each of the chaplains, 20*l.* to the schoolmaster, and 10*l.* to the usher, which sums shall be *in lieu* of all the monies to them respectively payable by virtue of the said letters-patent; the residue to be applied to the church repairs and other purposes mentioned in the act.

ALL the same remarks apply to this provision which we

have made on the correspondent provision in the statute of *Charles 2*. It is obvious that the chaplains are to be paid wholly out of the rate; that they have been deprived of their claim upon any other source of revenue; and that from year to year, whatever money may be in the hands of the wardens, a rate is to be made for this purpose. As therefore they have not been paid, and as no rate has been made, it is the duty of the authorities named in the act, to whom the writ has been directed, to proceed forthwith to impose and collect the rate, and pay the salaries specified in the statute. Upon these grounds we are of opinion that the mandamus is good, and that the returns made to it ought to be quashed.

Returns quashed.

Writ of peremptory mandamus to issue.

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PRINCE *v.* SAMO.

**TRESPASS** for a malicious arrest. Plea, not guilty. At the trial before Lord *Denman* C. J. at Guildhall, at the sittings after Trinity term 1836, it appeared that the defendant had arrested the plaintiff for 60*l.*, which the plaintiff contended had been given, and not lent to him by the defendant, and in an action for the amount, the jury found that it was a gift. The plaintiff afterwards indicted a person named *Lewis*, who had been a witness in the action against him for perjury. On the trial of the present action, a witness for the plaintiff was asked, in cross-examination, if he had not heard the plaintiff say, in giving evidence against *Lewis* on the indictment, that he, the plaintiff, had been insolvent six times, and that he had been remanded. On re-examination it was proposed to ask the witness if the plaintiff did not also state on his examination that the money received by the plaintiff was a gift, and not a loan. This evidence was objected to by the counsel for the defendant, and ruled to be inadmissible by the Chief Justice. The verdict passed for the defendant.

1838.  
The QUEEN  
*v.*  
The Wardens,  
&c. of  
ST. SAVIOUR'S,  
SOUTHWARK.

Monday,  
January 29th.

When a statement made by a party to a suit in giving evidence on a former trial has been got out in cross-examination, only so much of the remainder of the evidence is allowed to be given on re-examination as tends to qualify or explain the statement made on cross-examination.

1838.

PRINCE  
v.  
SAMO.

Sir *F. Pollock*, in the ensuing Michaelmas term, having obtained a rule nisi for a new trial, on the ground of an improper exclusion of evidence,

Sir *W. W. Follett* and *Chandless* shewed cause in Michaelmas term last (*a*). The question proposed to be asked in re-examination was inadmissible, because it in no way related to the question asked in cross-examination. The rule of law is, that all that is said by a party to a suit is admissible in evidence against him, and all that is said by him in the same conversation having a tendency to explain his previous statement, is evidence for him. The proper object of re-examination is, to bring out the true nature of the evidence already given, not to let in statements of matters not alluded to on cross-examination. [*Patteson J.* In the *Queen's* case (*b*), *Abbott C. J.* thought that there was a distinction as to what had been said by a party to a suit, and that in that case the whole of the conversation might be given, and not only so much as might explain or qualify the matter introduced upon the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit.] That arose in answer to questions relating to the conversation of a witness previous to a trial, and the distinction drawn by *Abbott C. J.* obviously relates only to the opportunity that ought to be given to a party to a suit to explain in what manner he made the admissions relied on. When it is stated that the whole of what is said by a party in a conversation may be given, there is a fallacy contained in the word "conversation." All that is said in a conversation relative to the matter in question may be given; but all that passed at one interview, at which numerous subjects may be discussed, cannot be given. The statements of the plaintiff in the indictment as to the loan are totally unconnected with the evidence given by him as to his dis-

(*a*) November 21st, before Lord *Denman C. J.*, *Patteson, Williams* and *Coleridge, Js.*

(*b*) 2 B. & B. 297.

charge under the insolvent debtors' acts. *Best J.*, who was for admitting the evidence in all cases, whether of a party or of a witness, merely puts it on the ground of its being due to the witness, that if one part of his conversation is used to disparage his character, the whole of what passed ought to be admitted on re-examination<sup>(a)</sup>. But that stands on the principle of its being an explanation of what had gone before. It is clear that the evidence sought to be given here was quite unconnected with the evidence as to the Insolvent Court. There is no analogy between a *vivâ voce* evidence and a written document; the rule of the law as to the latter is, that it is its own witness, which cannot apply to a conversation.

*Sir F. Pollock and Ball*, *contra*. The question sought to be put was of importance to explain the previous evidence, but if not, it was admissible as relating to the subject-matter of the suit. [Lord *Denman C. J.* It was assumed at the trial that the question was not of importance to explain, you must therefore confine yourself to the second point.] The distinction taken between written and oral testimony is false, and stands on no foundation. Perhaps in principle only so much of a written document should be read as tends to explain matter previously given, but the rule of law is otherwise, and if a bill in Chancery be put in merely for a date, or a letter be referred to, the whole must be read; *Lynch v. Clerke* <sup>(b)</sup>, *Earl of Bath v. Bathersea* <sup>(c)</sup>. In 1 *Phillips Ev.* 102, 6th edit, it is laid down that the whole of an admission must be taken together; "thus if a party, making an admission against his own interest, refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shewn." In *Thomson v. Austen* <sup>(d)</sup>, *Abbott C. J.* pointed out the danger of admitting a portion only of a conversation in evidence.

*Cur. adv. vult.*

<sup>(a)</sup> See the arguments of the Judges, 2 Hans. Parl. Deb. New Series, 1302.

<sup>(b)</sup> 3 Salk. 154.

<sup>(c)</sup> 5 Mod. 9.

<sup>(d)</sup> 2 D. & R. 358.

1838.

  
PRINCE  
v.  
SAMO.

Lord DENMAN C. J. on this day delivered the judgment of the Court. This was an action for a malicious arrest, on a false suggestion that money was lent by the defendant to the plaintiff, when it had been in fact given. The plaintiff called his attorney as a witness: he happened to have been present at the trial of a prosecution for perjury instituted by the plaintiff against a witness in the action wherein he had been arrested. The defendant's counsel inquired of him in cross-examination whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly, and remanded by the Court. This question was not objected to. On his re-examination the same witness was asked whether the plaintiff had not also on that occasion given an account of the circumstances out of which the arrest had arisen, and what that account was,—for the purpose of laying before the jury proof that the arrest was without cause or malicious, of both which facts there was scarcely any, if any, evidence whatever.

The question, expressly confined to that purpose, was, whether the plaintiff did not say, in the course of his examination, that the money was given and not lent. To this question the defendant's counsel objected, not on account of its leading form, but because the defendant having proved one detached expression, that fell from the plaintiff when a witness, does not make the whole of what he then said evidence in his own favour.

My opinion was, that the witness might be asked as to every thing said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it.

That a witness's statement of some one thing said by him, though drawn out by a cross-examination, does not permit the opposite party to add to it all that he may have uttered on the same occasion, was in effect decided by seven out of eight judges, whose opinion was taken by the House of

Lords in the progress of the bill of pains and penalties against her Majesty Queen *Caroline*. Lord *Tenterden*, in delivering that opinion, said, "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce new matters not suited to the purpose of explaining either the expressions or the motives of the witness (a)." And as many things may pass in one and the same conversation which do not relate to either, the learned Chief Justice declared the opinion of the judges, that the witness could not be re-examined even to the extent of all that might have passed relating to his becoming a witness, to which the statement proved had reference.

Lord *Wynford*, it is true (then Mr. Justice *Best*) dissented from this doctrine, and thought that the whole matter that passed in the same conversation was made admissible by the adversary's introduction of any part. But he rested his dissent on the propriety of giving a witness a full opportunity of self-vindication, which, in truth, the opinion of the seven judges already secured for him; and he also lamented that the prevailing rules of evidence were too narrow, and thus proved that he rather thought it a good opportunity to extend them, than that he was contented to abide by them. Lords *Eldon* and *Redesdale* are also reported in the Parliamentary Debates (a) to have intimated their disagreement from the opinion of the seven judges. They, however, acted upon it; and the extreme caution with which the former learned lord framed and often remodelled the question to be proposed to the judges, can hardly be reconciled with the doctrine, that the whole of what passed at the conversation referred to was for that reason admissible.

Upon the whole we think it must be taken as settled, that proof of a detached statement made by a witness at a former

(a) 2 Hans. Parl. Deb. New Ser. 1307.

1838.

PRINCE  
v.  
SAMO.

1838.  
 PRINCE  
 v.  
 SAMO.

time does not authorise proof, by the party calling that witness, of all that he said at the same time, but only of so much as can be in some way connected with the statement proved.

But in the present case the statement did not proceed from a witness, but from a party to the suit, and the opinion delivered by Lord *Tenterden* is not only confined to the former case, but is expressly said by him not to apply in the latter. His language is accurately cited by Mr. *Starkie* (a), from 2 B. & B. 297, "when a witness has been cross-examined as to a conversation with the adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part so introduced, provided only that it relate to the subject-matter of the suit." The reason is added, "because it would not be just to take part of a conversation as evidence against a party without giving him at the same time the benefit of the entire residue of what he said on the same occasion."

We forbear from entering into a detailed examination of the doctrine there laid down. We have considered it repeatedly with the utmost care, and with all the diffidence inspired by such an authority, but we cannot assent to it. We will merely observe, that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extra-judicial, that it was not necessary as a reason for the answer to the question that was proposed; that it was not in terms adopted by Lord *Eldon* or any of the other judges who concurred; that it was expressly denied by Lords *Redesdale* and *Wynford*; and that it does not rest on any previous authority. We ought to add, that in our opinion the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested. No-

thing would be more easy than to find or imagine examples of the extreme injustice that might result from allowing such statements to be received; but none can be stronger than the actual case. Because the plaintiff was shewn to have said that he was insolvent, he would have been allowed, without any reference to his own insolvency, to prove, by his discourse at the same period, every averment in his declaration, with every circumstance likely to excite prejudice and odium against the defendant; and if this were evidence the jury would be bound to consider, and might give full effect to it, and thus award large damages for an injury, of which no particle of proof could be found but the plaintiff's own assertion.

We are of opinion that this line was correctly drawn at the trial, and that this rule must be discharged.

Rule discharged.

1838.

PRINCE  
v.  
SAMO.

The QUEEN v. The Mayor and Corporation of LEEDS.

SIR W. W. FOLLETT applied for a rule nisi for a mandamus to be directed to the mayor and common councilmen of Leeds, commanding them to admit Mr. *Charles Wood* to the office and place of a councillor for the North Ward of the borough of Leeds. The affidavit stated that Leeds was a borough divided into twelve wards, one of which was called the North Ward; the North Ward returned three councillors: that the term of office of Mr. *Dampton Lup-ton*, one of the councillors for the North Ward, expired on the 1st of November, 1837. Mr. *Brown*, who was elected a councillor for the North Ward in November, 1836, became bankrupt in the following June. No notice was given by

Tuesday,  
January 30th.

Previous to the annual election of councillors in November, in a borough divided into wards, the mayor published a notice purporting to be made with the concurrence of the aldermen and assessors, to the effect that two vacancies were to be filled up,

one in the room of *A.B.*, going out by rotation, and one in the room of *C.D.*, who had been declared a bankrupt. The council had not declared the office of *C.D.* to be void, or given any notice thereof. At the election 250 burgesses voted for two candidates jointly, and 120 voted for a third singly. Held, that the votes given for the two candidates were thrown away, and that the third candidate to whom the 120 votes were given was duly elected.

1838.  
  
 The QUEEN  
 v.  
 Mayor and  
 Corporation of  
 LEEDS.

the town council or by the town clerk, that *Mr. Brown's* office had become vacant. Previously to the 1st November, 1837, the mayor, in a notice purporting to be made with the concurrence of the aldermen and assessors of the different wards, published a placard signed by himself only, stating the situation of the different polling-booths in the different wards. This notice also stated that there were two vacancies for councillors in the North Ward. On the day of election a large majority of the burgesses of the North Ward voted for two councillors, *Mr. Watson* and *Mr. Whitehead*, jointly; about one hundred and twenty voted for *Mr. Wood* singly; the votes were given by means of printed papers, and those voting papers which were given in favour of *Mr. Watson* and *Mr. Whitehead*, stated simply that the voter voted for those two persons.

*Sir W. W. Follett* in support of the application for the rule nisi. In this case there was only one vacancy to be filled up, for when a town councillor becomes disqualified by any of the modes mentioned in sect. 52 of the Municipal Act, his office must be declared to be void by the council, and notice must be given thereof under the hands of three of the council before a new election can take place. If such declaration had been made, and notice given in the present case, a question might have arisen, whether the extraordinary vacancy should be filled up under sect. 47, at the annual election of councillors in November. But the only notice given in this case, of an extraordinary vacancy, was by the mayor, who is wholly unauthorized so to do. All the votes, therefore, which were given for two candidates were thrown away, and the candidate who received the single votes was duly elected to the office of councillor.

*Sir J. Campbell A. G.*, and *Baines*, shewed cause in the first instance by consent. It may be conceded that there was only one vacancy to be filled up. But as sections 32 and 43 give the management and direction of elections to

the mayor and aldermen, it is too much to contend that when the burgesses follow the directions published by the mayor with the concurrence of the aldermen, that their votes should be entirely thrown away, and that a councillor elected by a small minority should be forced upon the borough. The consequence of the mistake made by the mayor is, that there was a void election, and that there must be a new one. To make the election valid for the candidate to whom the minority gave their votes, the objection should have been taken prior to going to the poll.

1838.  
  
 The QUEEN  
 v.  
 Mayor and  
 Corporation of  
 LEEDS.

Sir *W. W. Follett*, (with whom was *Nevile*), contra, was stopped by the Court.

LORD DENMAN C. J.—It is conceded that there was only one vacancy to be filled up in this borough, and it appears that about 250 burgesses voted for two candidates, and 120 for Mr. *Wood* only. It is clear that the 250 burgesses threw away their votes entirely; but it is said, that because the mistake was made by the mayor, to whom the burgesses naturally look for proper instructions as to their conduct at elections, the election at most was only void. But I think Mr. *Wood* has been duly elected; we have not to inquire whether the mistake might not very reasonably have occurred, but whether Mr. *Wood* did not receive the majority of valid votes.

LITTLEDALE and WILLIAMS Js. concurred.

· Rule absolute (a).

(a) *Coleridge J.* was sitting in the Bail Court.

1838.



Tuesday.  
January 30th.

*Semble*, the votes given at a municipal election for a candidate rendered ineligible by the express words of an act of parliament, in consequence of his holding another office in the same corporation, are not thrown away, unless express notice of the ineligibility has been given to the voters. At an annual election of councillors in one of the wards of a borough divided into two wards, a majority of votes was declared in favour of a candidate who was an assessor for the other ward: No notice of ineligibility of this candidate had been given, but the mayor rejected his name from the list published by him, pursuant to sect. 35 of the Municipal Corporation Act, and inserted the name of a candidate having a minority of votes, who accepted the office. The Court granted a quo warranto against the latter candidate.

### The QUEEN v. HIORNS.

*G. HAYES*, in Michaelmas term last, had obtained a rule calling upon the defendant to shew cause why an information in the nature of a quo warranto should not be filed against him for exercising the office of a town councillor in the borough of Warwick.

By the affidavits on which the rule was obtained, it appeared that Warwick is divided into two wards, namely, St. Mary's and St. Nicholas'. At the annual election in 1837 for councillors in St. Mary's Ward, four councillors were to be elected, and the election was held on November 1st before the mayor and the assessors of the ward. At the close of the poll, the mayor and assessors, assisted by the town clerk, and in the presence of many burgesses, proceeded to examine the following papers, and the town clerk, in the hearing of the mayor and assessors, announced the result of the votes given at the election as follows:—

|                                          |     |
|------------------------------------------|-----|
| <i>James Tibbits</i> , . . . . .         | 341 |
| <i>Edward Greaves</i> , . . . . .        | 329 |
| <i>George Callett Greenway</i> . . . . . | 327 |
| <i>Joseph Phillips</i> , . . . . .       | 327 |
| <i>Richard Hiorns</i> , . . . . .        | 303 |

And added, that the first four were duly elected. At the time the election took place, *James Tibbits*, the candidate who stood first on the poll, was one of the assessors for the Ward of St. Nicholas, to which office he had been elected in the previous March. But it was sworn in the affidavits in support of the rule, that no notice was given to any voter, at any time previous to or during the election, that *James Tibbits* was ineligible; nor was any allusion made to his ineligibility on the ground of his being assessor of St. Nicholas Ward, nor on any other ground.

The Court granted a quo warranto against the latter candidate.

On the 2d November, a list of the councillors elected on the previous day, bearing the mayor's signature, was published, in which the name of *James Tibbits* was omitted, and *Greaves, Greenway, Phillips*, and the defendant, were declared to have been elected councillors of St. Mary's Ward. Mr. *Hiorns* afterwards made the declaration required by the statute, and acted as councillor.

The affidavits in answer stated the fact of *James Tibbits* being assessor of St. Nicholas's Ward, and that deponents believed that it was well known throughout the borough that Mr. *Tibbits* held the office, and that he was acting as assessor in the Ward of St. Nicholas at the very time that the election was taking place in the Ward of St. Mary.

Sir *J. Campbell A. G.*, Sir *W. W. Follett*, and *Austin*, now shewed cause. By the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, sect. 37, councillors are declared ineligible to be or to be elected assessors. And by the 7 Will. 4 and 1 Vict. c. 78, s. 15, assessors are disqualified from being elected councillors. Under the last enactment, Mr. *Tibbits*, as an assessor of St. Nicholas's Ward, was absolutely ineligible. [*Coleridge J.* The 37th section of the first act seems only to apply to assessors of the whole borough. That section provides for the election of auditors and assessors for the whole borough, and disqualifies councillors from being elected "such assessors as aforesaid." Here Mr. *Tibbits* was only a ward assessor.] Section 43 transfers to ward assessors all the provisions of the act which relate to assessors of the whole borough where there are no wards. The disqualification however in this case arises from sect. 15 of the 7 Will. 4 and 1 Vict. c. 78, the language of which is general, and enacts that "no burgess shall be eligible to be elected a member of the council while holding the office of assessor." Mr. *Tibbits*, therefore, being an assessor, was ineligible; and as all persons must be taken to be cognisant of the law, this enactment was a parliamentary notice to the electors of *Tibbits'* ineligibility. If notice had

1838.  
  
 The QUEEN  
 v.  
 HIORNS.

1838.  
  
 The QUEEN  
 v.  
 HIGGINS.

been given previous to or during the election, there is no doubt, according to *Rex v. Hawkins* (a), which was confirmed in the House of Lords (b), that all votes given after the notice would have been thrown away. But what need could there be of notice in a case like the present? Mr. *Tibbits* was a public officer of the corporation, which fact must have been known to the voters, and he was rendered ineligible by an express parliamentary declaration. The words of the act creating the ineligibility render the present case unlike any other case of disqualification, for they declare positively that the assessor shall be incapable of being elected.

There is another reason why notice ought not to be required under these acts, for by sect. 32, the voting is to be by delivering in papers containing the names of the parties for whom the burgess votes, and therefore there is not the same opportunity to give notice as when the vote is delivered *vivâ voce*.

Sir *F. Pollock*, and *G. Hayes*, *contrâ*, were stopped by the Court.

LORD DENMAN C. J.—When a disqualified candidate comes forward at a municipal election, notice ought to be given that he is not eligible, and that the objection to his eligibility is intended to be relied upon; otherwise a candidate might step in at the tail of an election on a single vote. The point arising from the objection made by Mr. *Austin*, that no opportunity is afforded for notice in the peculiar mode of voting pointed out by the Municipal Corporation Act, is novel, and deserves consideration hereafter, but in the meantime the writ must go.

LITLEDALÉ, WILLIAMS, and COLERIDGE, Js. concurred.

Rule absolute.

(a) 10 East, 211.

(b) 2 Dow, 124.

1838.

Tuesday,  
Jan. 30th.

## The QUEEN v. RICKETTS.

**MAULE**, in Michaelmas term last, had obtained a rule nisi for a mandamus to the defendant, (as alderman of the ward) commanding him to proceed to the election of a town councillor for the Ward of Bedminster, in the city of Bristol, in the place and stead of *Robert Phippen*, upon notice of the rule to be given to Mr. *Phippen*.

Where a councillor's name has been expunged from the burgess roll, quo warranto is the proper mode to try his title to the office, and not mandamus to the mayor to hold a fresh election.

By the affidavits on which the rule was obtained, it appeared that *Robert Phippen* had been elected a councillor for Bedminster Ward in 1835, and that, in 1837, Mr. *Phippen* having refused to pay a poor's rate, his name was objected to at the revision of the burgess roll, on that ground, and struck out. Application was then made to the defendant, as alderman of Bedminster Ward, to proceed to the election of a councillor in the place of Mr. *Phippen*, who had become disqualified in the mode described, but the defendant refused so to do.

In the affidavits filed in answer, Mr. *Phippen* stated, that he had been elected and still was a town councillor for the Ward of Bedminster, and set out the grounds for his refusal to pay the rate in question. Mr. *Ricketts* stated that he had not received any official communication that any vacancy had occurred in the said ward, or that Mr. *Phippen* was ineligible.

Sir *F. Pollock* now shewed cause for Mr. *Ricketts*. The proper mode of proceeding in this case is by quo warranto, not by mandamus. When a person is once in office, the only mode of getting him out is by quo warranto, except in the cases pointed out by 5 & 6 Will. 4, c. 76, s. 52, viz. where the officer becomes bankrupt or insolvent, or is absent for a certain time. In those cases the council are authorized to declare the office void. Mr. *Phippen*'s disqualification is not one of those specified, but it arises on s. 28, if it exists at all. It involves a ques-

1838.  
  
 The QUEEN  
 v.  
 RICKETTS.

tion of law, whether it is such a disqualification as to render the office void even on quo warranto; therefore the mayor or ward alderman cannot be called on to decide it.

Sir *W. W. Follett* and *J. Talbot*, for *Mr. Phippen*. It has already been decided by this Court, in *Rex v. Winchester (a)*, that quo warranto, and not mandamus, is the proper remedy where a party is actually in office. So also in *Rex v. The Mayor of Oxford (b)*, where *Mr. Towle*, who had been elected a councillor, was declared by the mayor to be disqualified, and another person was elected councillor in his stead, this Court held that *Mr. Towle* ought to bring quo warranto for a usurpation of his office, and not a mandamus. It is also clear from the 7 *Will.* 4 and 1 *Vict.* c. 78, s. 23, which limits the time for proceedings under the municipal elections, that quo warranto informations are contemplated as the remedy for cases of this kind.

*Maule*, contra. Directly *Mr. Phippen's* name was expunged from the burgess roll, he ceased *ipso facto* to be a councillor. The words of s. 28 of 5 & 6 *Will.* 4, are, "no person shall be qualified to be elected, or to be a councillor, who shall not be entitled to be on the burgess list." *Mr. Phippen* has been adjudged not to be entitled to be and he is not on the burgess list: the conclusion therefore follows as a matter of course. It seems to be contended, as a general proposition, that when a party exercises an office, however manifestly without title, still that a quo warranto information must be resorted to in order to oust him. The only authority cited for this is *Rex v. Oxford (b)*, which however is directly in favour of this application; for in that case the mayor of Oxford, on *Mr. Towle's* name being omitted from the burgess roll, proceeded to a new election, and no intimation was made by this Court that he was not perfectly right in so doing. If then the mayor may proceed to an election

(a) 2 N. & P. 274.

(b) 1 N. & P. 474.

in such a case, this Court will compel him to do so, if he refuses. S. 47 shews in what manner extraordinary vacancies are to be filled up; and it cannot be contended that this is not an extraordinary vacancy. There are numerous authorities to shew that mandamus will go to admit an officer, though the office might be alleged to be full. As in the case of a mayor holding office under a clause for holding over, *Rex v. Robbison*(a), and in the cases of *The Borough of Bossiney*(b), and *Aberystwith*(c), the Court granted a mandamus to elect a mayor, although there was a mayor *de facto*. So also the writ goes if there is reason to believe that the election was colourable. But on the principle contended for, quo warranto would have been the proper remedy in all these cases. *The King v. Bankes*(d) shows, that in all cases under the old corporate system, when a mandamus issued to elect a mayor, the subsisting mayor must be made a party to the rule. In the case of *The Borough of Bossiney*(b), the same ground was urged as is taken to-day, viz. that the actual mayor should first be ousted; but the Court, upon consideration, ordered a mandamus to issue, as the party in the office had no shadow of right, and the intent of the 11 Geo. 1, c. 4, was to give the corporation a rightful officer as soon as might be. So in this case, Mr. *Phippen* having no shadow of right, on what ground can the expense and procrastination of a quo warranto be required?

Lord DENMAN C. J.—It is quite clear that when an office is full, a new election shall not be had until the title of the person in office is decided upon by quo warranto. In certain cases specified in s. 52, a course is pointed out to determine the vacancy of an office, but no such power is given to the mayor or alderman in the present case; and those officers have not the power of ascertaining whether the fact relied upon as a disqualification,

(a) 1 Str. 555.

(c) 2 Str. 1157.

(b) 2 Str. 1003.

(d) 1 W. Bl. 445.

1838.  
  
 The QUEEN  
 v.  
 RICKETTS.

has that effect or not. In the cases pointed out by the statute, the council may easily satisfy themselves of the bankruptcy, insolvency, or absence of a party, so as to enable themselves to make the declaration required by the statute; but in the present case difficult questions of law and fact might arise, which the alderman would feel himself incompetent to deal with. As to the inconvenience which exists in referring these cases to the result of a quo warranto information, it is one which has existed from the commencement of corporations.

LITLEDALE J.—It is not so clear that any extraordinary vacancy has occurred in this case. S. 52 provides, that any person who shall be declared a bankrupt, or who petitions the Insolvent Debtors' Court, or who shall be absent for a certain time, shall immediately become disqualified; in which cases, upon the simple fact being brought before the council, they are rendered a competent tribunal to declare the office vacant. But in this case the alderman has no power given him to make the declaration, and no mode is pointed out by which the facts are to be brought before him. I think that the extraordinary vacancies referred to in s. 47, are intended to be those only which arise by the death of the party, or by judgment of ouster on a quo warranto information, or the declaration of the council in the cases contained in s. 52. In those cases only, I think that the alderman may proceed to a fresh election.

WILLIAMS J.—The argument of Mr. *Maule* proceeded chiefly on the facts of this case being so clear, that it would be a waste of time to require a quo warranto information, and that Mr. *Ricketts* ought to have proceeded to the election at once. But it appears to me that many questions might arise on the disqualification contended for in the present case. Mr. *Phippen's* name might have been omitted by fraud, or by mistake, and he might be still entitled to be on the burgess roll. We ought not therefore

to call on the alderman to do an act, which might afterwards turn out to be erroneous in law.

1838.

The QUEEN  
v.

RICKETTS.

Rule discharged with costs to Mr. Ricketts. (a)

(a) Coleridge J. was in the Bail Court.

The QUEEN v. PEPPER.

**CHANNELL**, in Michaelmas term last, had obtained a rule, calling upon the defendant to shew cause why a quo warranto information should not issue against him for exercising the franchise of a burgess of the borough of Maldon. The affidavit on which the rule was obtained set out the charters relative to *Pepper's* right of admission, and stated that he was sworn in as a freeman on September 24, 1832, and that he had since voted in the election for members of parliament for the borough, but that on the last revision of votes, in 1837, his name had been struck off the roll by the revising barrister, on the ground that he had been improperly sworn in to the office of freeman. The affidavits in answer set out *Pepper's* title to be admitted to the freedom of the borough, and stated that the right of *Pepper* had been disputed twice before the revising barristers, who had decided his admission to be good, and that he was entitled to vote for members of parliament.

Tuesday,  
January 30th.

Quo warranto information does not lie against the freeman of a borough who does not appear to possess any corporate property, and who had been struck off the roll of electors for members of parliament by the revising barrister.

*Thesiger* and *C. R. Turner*, on a former day in this term (b), shewed cause. This application is out of time, for the 7 Will. 4 & 1 Vict. c. 78, s. 23, enacts, that applications for a quo warranto information against any burgess must be made within twelve months from the time of election or disqualification. *Pepper* was sworn in a freeman in September, 1832. It may be said that the words of that section apply to burgesses of new corporations, but they

(b) Jan. 13, before Lord Denman C. J., Littledale, Williams and Coleridge Js.

1838.  
  
 The QUEEN  
 v.  
 PEPPER.

are general, and include all burgesses. Another objection is, that the defendant does not exercise any franchise for which a quo warranto information can issue. By the 5 & 6 Will. 4, c. 76, the rights of freemen are extinguished altogether, except as to their shares of corporate property, and reserving to them the right of voting secured by the 2 Will. 4, c. 45, s. 32. The affidavits in this case do not disclose that there is any corporate property at Maldon, to which the defendant as a burgess is entitled, therefore the Court cannot intend that he has any such right. And as to his right of voting, it is expressly stated that his name has been struck off the parliamentary roll at the last revision. There is therefore no user or claim to an office, and according to *Rex v. Whitwell* (a), the Court will not grant an information. It also appears by the judgment of Lord Kenyon C. J., in *Rex v. Mein* (b), that a freeman, who has no vote for members of parliament, does not exercise an office that can be questioned by quo warranto information. In *Rex v. Saunders* (c), where a quo warranto information was moved for against an alderman of Taunton, after the corporation had been dissolved, Lord Ellenborough C. J. refused the application, "as there were no civil rights in controversy." The present application is merely speculative, and can only be founded on some prospective grievance.

Sir J. Campbell A. G. and Channell, *contrà*. The main question is, whether the 7 Will. 4 and 1 Vict. c. 78, s. 23, is applicable. It clearly is not, for it only refers to burgesses of new corporations. The whole act relates to such burgesses, and to such burgesses only.

The objection that *Pepper* was struck off at the last revision of electors is without weight, because his title depends upon his admission as freeman, in 1832. Although his name as an elector has been expunged by the revising barrister, he may tender his vote at any election that takes

(a) 5 T. R. 85.

(b) 3 T. R. 596.

(c) 3 East, 119.

place after the revision, and a committee of the House of Commons may decide that his name ought not to have been struck off. *Pepper* was admitted in 1832; if no application be allowed to be made till he is on the burgess roll, and his claim be allowed by some future revising barrister, then the six years may elapse, during which only, under 32 Geo. 3, c. 58, his title as burgess can be disputed. As to *The King v. Whitwell* (a), there has been a sufficient user here; *Pepper* has actually voted for members of parliament, and his disqualification from so doing at present is only partial; besides, *Rex v. Tate* (b) shews, that being sworn into an office is a sufficient user. The 9 Ann. c. 20, mentions the office of freeman as one for which a quo warranto information lies, therefore the objection on that ground fails.

1838.  
  
 The QUEEN  
 v.  
 PEPPER.

*Cur. adv. vult.*

Lord DENMAN C. J., on this day, delivered the judgment of the Court.—This was a rule calling on the defendant to shew cause why a quo warranto should not issue against him, for usurping the office of a freeman of the borough of Maldon. It appears upon the affidavits that he is upon the freeman's roll, but not on the burgess roll, and that his vote was expunged from the parliament register upon objection taken at the last revision. He was admitted in the year 1832, and it was objected, first, that this case fell within the limitation clause of 7 Will. 4 and 1 Vict. c. 78, s. 23, and therefore the application was out of time; but it is unnecessary for us to intimate any opinion on that point, because another objection was made, upon which we think the rule ought to be discharged. It is a well established rule in corporation law, that quo warranto will not lie unless against a party in possession and user of such a franchise or office as may be properly the subject of such an information; *Rex v. Whitwell* (a). The defendant here, it was conceded, is in possession of no such

(a) 5 T. R. 85.

(b) 4 East, 337.

1838.

The QUEEN  
v.  
PEPPER.

franchise; he is a freeman, it is true, but his present rights as such barely are limited by the conjoint operations of the Reform and Municipal Corporation Acts, to the sharing in the common lands or joint stock, if any, of the borough. Supposing even that he is so situated, a rule might properly be made absolute against him, yet here the affidavits do not disclose, and we cannot presume, that there are any common lands or joint stock. It was contended, however, that he had claimed to exercise the elective franchise, and though now expunged, his name and vote might be restored on petition by an election committee, or that at the ensuing revision the revising barrister might place his name on the list. It may be conceded, that on either supposition he would be put into the possession of such a franchise as a quo warranto might lie for usurping. But we have found no authority which decides that an unsuccessful claim, and the possibility of a renewed claim with success, to a franchise or office, are equivalent to that actual usurped possession which the information in a quo warranto supposes. And we may add, that there is no reason to presume any one of the facts, upon the supposition of which the argument is founded,—all legal presumptions are the other way. We ought rather to presume the decision of the revising barrister to be right, and that it will be acquiesced in.

It was urged upon us, that unless we granted this rule, six years from the date of admission would expire before another opportunity could occur of raising the question, and so the admitted defect in his title would be cured. Whether under the circumstances such will be the case, we do not stop to inquire; for admitting it to be so, that ought not to influence our decision upon the present state of things. The same argument was urged in *Rex v. Whitwell* (a), with the same success. This rule must therefore be discharged.

Rule discharged.

(a) 5 T. R. 85.

1838.

Wednesday,  
January 31st.

Ex parte HARVEY.

**BY** a resolution of the 6th October, 1794, the mayor, aldermen and citizens of the city of Bath, passed a resolution "that *John Mayer* be continued and employed by and under this corporation in doing the various business relating to the waterworks, &c., and that he do also attend and assist upon the chamberlain of this city in the various business of his office, under the direction of the committee appointed to inspect and examine, and report on the chamberlain's accounts, for so long of one year as he, the said *John Mayer*, shall behave himself well therein; for which he is and shall be entitled to receive a salary after the rate of 70*l.* per annum, to be paid to him quarterly by this corporation or their chamberlain."

On the 24th September, 1804, by another resolution of the corporation, *Henry Walters Esq.* was duly elected into the office of chamberlain and receiver of the city for the year ensuing, with a salary of 250 guineas, and his deputy 100 guineas.

In 1810, *John Mayer* having fallen into difficulties, the then chamberlain (*Mr. Clark*) asked *Mr. Harvey* if he was willing to accept the office of assistant chamberlain, and to succeed *Mayer*, to which *Mr. Harvey* assented. On the 16th March, 1810, by a resolution of the corporation, *Mr. Slater* was appointed chamberlain for the ensuing year commencing October, 1810; and *Mr. Clark*, the then chamberlain, was authorized to employ such fit and proper person to assist him in his said office as he should think proper, and on the following day *Mr. Harvey* was informed that he had been appointed to the office of assistant chamberlain, and he thereupon entered into and performed the duties of the office. On the 1st October, 1810, the corporation passed a resolution "that *Mr. Harvey* be recommended to *Mr. Slater*, the present chamberlain, to be his assistant in that office, with a salary of 100*l.* a year, to be

In 1794 the corporation of Bath appointed *A. B.* assistant chamberlain of the city for a year, at a yearly salary. In 1804 the salary of *A. B.* was raised. In 1810 *C. D.* was appointed assistant chamberlain by the chamberlain, and he continued to hold this office till the passing of the Municipal Corporation Act. In 1827 the corporation had again raised the salary. On the passing of the Municipal Corporation Act, the office of *C. D.* was abolished, and a claim having been made by him for compensation, the Lords of the Treasury awarded that his office was not the subject of compensation within the 66th sect. of the Act; and the Court of Q. B. confirmed their decision.

1838.

Ex parte  
HARVEY.

paid by the corporation. In September, 1812, Mr. *Harvey* applied to the corporation for an increase of salary, who thereupon passed a resolution that the salary should be increased from 100*l.* to 150*l.* per annum. In 1820, by a resolution of the corporation, Mr. *Harvey* was appointed superintendant of the waterworks, for which he received no salary; but in the year 1827 it was resolved, by the mayor, aldermen and citizens, "that the salary of the chamberlain's assistant be increased to the sum of 200*l.* per annum." On the passing of the 5 & 6 Will. 4, c. 76, it was resolved to discontinue the payment of the salary to the assistant chamberlain. Upon this Mr. *Harvey* preferred a claim for compensation to the town council, which they rejected. Mr. *Harvey* then memorialized the Lords of the Treasury, who, on the opinion of the law officers of the crown, that the office of Mr. *Harvey* was not an office within the meaning of sect. 66 of 5 & 6 Will. 4, c. 76, by a minute of the 16th May, 1837, awarded that Mr. *Harvey* was not entitled to compensation.

Mr. *Harvey* presented a further memorial to the Lords of the Treasury, on the ground that since their minute of the 16th May, (in which their lordships adverted to the opinion of the law officers of the crown, that Mr. *Harvey* was not an officer of the borough within the meaning of the 66th sect. of 5 & 6 Will. 4,) a report of *The King v. The Mayor &c. of Bridgewater*, had been published in 1 Nev. & Per. 466, wherein it appeared that the law officers of the crown had insisted upon the limited meaning of the word "officer," whereas a more liberal construction had in that case been given to it by the Court of King's Bench. The Lords of the Treasury, however, refused to reopen their award.

Sir *W. W. Follett*, upon an affidavit setting out the above particulars, now moved for a rule nisi for a mandamus, to the town council of Bath, commanding them to grant Mr. *Harvey* compensation. Although the office for which Mr. *H.* claims compensation was not a chartered office, he clearly

was an officer of the corporation, and had every right to look upon his office as permanent; it therefore comes strictly within the case of *The King v. The Mayor &c. of Bridgewater* (a). It is true that the Lords of the Treasury have exercised the discretionary power with which the legislature has invested them, but they have in this case decided against his claim, on the ground of his office not being within the 66th section. It is submitted that if they decide contrary to law, this Court will review their decision. It is clear, from the language of the resolutions, that this has always been treated and considered as an office.

1838.

Ex parte  
HARVEY.

LORD DENMAN C. J.—It seems to me that this case is very distinguishable from *The King v. The Mayor &c. of Bridgewater* (a). The office in question there was inseparable from the town clerkship, and was intimately connected with the corporation. I think it is impossible to say that this was a corporate office. It is just as if the corporation had recommended any attorney they might have employed to take in an additional clerk.

LITLEDALE, WILLIAMS and COLERIDGE Js. concurred.


Rule refused.

(a) 1 N. & P. 466.

HILL and RANDALL v. SYDNEY, Knt.

Tuesday,  
January 30th.

ASSUMPSIT for work and labour of the plaintiffs as solicitors in prosecuting, defending and soliciting divers causes, suits and businesses for the defendant, and for fees due in respect thereof &c. Plea, non assumpsit. At the trial at the sittings in Middlesex after Trinity term, 1836, In assumpsit for work and labour by the plaintiffs, as solicitors, on a joint retainer, an objection that one of them was not specially admitted of the Court in which the business was done, must be pleaded specially.  
*Quere*, whether, if so pleaded, the objection is valid.

1838.  
  
 HILL  
 and another  
 v.  
 SYDNEY.

before Lord *Denman* C. J., it appeared that this was an action brought by the plaintiffs, who were in partnership as attornies and solicitors, for their bill of costs in conducting a suit through Chancery as agents for the defendant, who was also an attorney. The defendant objected, that the action was not maintainable, as Mr. *Randall*, one of the plaintiffs, had not been admitted a solicitor of the Court of Chancery, to which point *Brandon v. Hubbard* (a) was cited. For the plaintiffs a joint retainer was proved by the defendant, contained in a letter from him to the plaintiffs, requesting them to conduct the suit in Chancery for him as his agents. The Chief Justice reserved the point, and the verdict passed for the plaintiff.

*Mansel* having obtained a rule nisi to enter a nonsuit in the ensuing Michaelmas term,

*Platt* and *Godson*, on a former day in this term (b), shewed cause. The case of *Arden v. Tucker* (c) shews that this action is maintainable. That was an action by two partners for their costs in conducting a suit in the Palace Court, and it appeared that only one of them was an attorney of the Palace Court, but the Court held, that they were entitled to sue for their costs jointly, although in that case the retainer was to the partner who was an attorney of the Palace Court singly. *Elkins v. Harding* (d) is also an authority for the present action, for it was held there that a clerk of the Court of Exchequer might sue jointly with his partner, who was not a clerk of the Court, for agency business done in that Court. In *Brandon v. Hubbard* (a) it appeared that the business sued for was preparing a replevin bond, and that one of the plaintiffs only was a replevin clerk, which was a business the other partner had nothing to do with, and therefore they had no joint interest. *Jones v. Jones* (e) decided, that a country attorney who had conducted a suit in the

(a) 2 B. & B. 11.

(b) Jan. 23rd.

(c) 4 B. & Ad. 815.

(d) 1 C. & J. 345; 1 Tyr. 274.

(e) 5 Dowl. 474.

Exchequer in the name of his London agent, without any consent in writing, was entitled to recover his costs. And in *Attorney-General v. Malin* (a) it was held, that a solicitor inrolled in the Court of Chancery might conduct a suit on the Equity side of the Exchequer in the name of a clerk in the King's Remembrancer's Office in that Court. All the cases on the subject have arisen between attorney and client, but the rule in these cases does not apply to cases of agency business. The 2 Geo. 2, c. 23, is the act that prevents attornies and solicitors from suing for business done, unless they are admitted of the Court in which the business was transacted; but the 12 Geo. 2, c. 13, s. 6, expressly excepts agency business from the provisions of that act. That section therefore is decisive of the case. Again, under the 2 Geo. 2, c. 23, s. 10, attornies are allowed, with the consent of the attorney of another Court, to carry on business in that Court in the name of such attorney. The Court, therefore, will intend that this consent was given, if consent be necessary in the present case. Lastly, this defence should have been pleaded. It only amounts to a confession and avoidance of the cause of action (b). *Potts v. Sparrow* (c) decided, that the illegality of the work and labour performed by an attorney cannot be given in evidence under *non assumpsit*.

*Mansel*, contra. This application is founded on the 2 Geo. 2, c. 23, s. 24, the words of which are express. As to *Arden v. Tucker* (d), there is no statute to prevent a duly admitted attorney from practising in the Palace Court, although the rules of that Court may restrict the number who practise there. There is no rule of law, therefore, to prevent two partners from suing for business done by one of them in that Court. But in this case, the only person with whom the contract could be made was the admitted solicitor of the Court of Chancery. Sect. 10 of 2 Geo. 3, c. 23, allows attornies having a written consent to practise


1838.  
HILL  
and another  
v.  
SYDNEY.

(a) 2 Tyr. 512.

(c) 3 Dowl. 630.

(b) See *Lane v. Glenny*, 2 N. & P. 258.

(d) 4 B. & Ad. 815.

1838.  
  
 HILL  
 and another  
 v.  
 SYDNEY.

in one another's names in Courts of Law; but it does not apply to Courts of Equity, *Vincent v. Holt* (a); and it will be observed that no mention of Courts of Equity occurs in the latter part of the clause. In *Latham v. Hide* (b) it was held that an attorney has no lien for his costs, or for money out of pocket, in respect of an action conducted by him in a Court of which he has not been admitted. In *Arden v. Tucker* (c), a case of *Heming v. Wilton* (d) was cited in argument, which is directly in point here. Mr. *Heming* there sued the defendant, who was an attorney, for business done as a clerk in Court in the Exchequer. The defence was, that Mr. *Heming's* partner should have joined; but although it was proved that the defendant had given instructions to both partners, yet, as the plaintiff alone was entitled to practise in the Exchequer, it was held that the action was well brought. If a consent could be given by a solicitor, that an attorney should practise in his name in the Court of Chancery, the Court cannot intend that it was given in this case, because the objection was taken at *Nisi Prius*, and no consent was proved. As to the objection being pleaded, if Mr. *Hill* was the only proper party to sue, it is a misjoinder of plaintiffs, which is an objection that may be taken on the general issue.

*Cur. adv. vult.*

LORD DENMAN C. J. on this day delivered the judgment of the Court.—This was an action brought by the plaintiffs to recover for agency business in the Court of Chancery. The objection relied on for the defence was, that one of the plaintiffs had not been admitted a solicitor of the Court of Chancery. Several answers were given, which it is unnecessary to notice, as upon consideration, we are all of opinion that this objection should be pleaded specially.

Rule discharged.

(a) 4 Taunt. 452; see *Medowcroft v. Holbrooke*, *contra*, 1 H. Bl. 50, and Lord *Lyndhurst's* review of these cases in *Attorney-*

*General v. Malin*, 2 Tyr. 512.

(b) 1 Dowl. 594.

(c) 4 B. & Ad. 815.

(d) Not reported.

1838.

Thursday,  
January 18th.

## The QUEEN v. PAYN.

A Writ of mandamus having issued in this case (a), tested on the 30th Jan., 7 Will. 4, calling upon the defendant to deposit his two books of accounts with the clerk of the peace, and alleging, that although often requested to do so, and although the said books still remained in his custody, power and control, he had refused to deposit them. The defendant returned that he had, on the 25th Feb. then last past, deposited one book of account with the clerk of the peace, and that no other of the said books was, on the day of the teste of the writ, nor since hitherto, in his custody, power and control. This return having been filed in Hilary vacation last, Sir J. Campbell A. G., in Easter term following, obtained a rule nisi, calling upon the defendant to shew cause why the return should not be taken off the file, on the ground of its being evidently intended to operate as a delay of justice, and to evade compliance with the rule pronounced by the Court. He read affidavits shewing that the books had been delivered into the possession of the defendant, and that in the former argument (a) he had admitted his still retaining possession of them; and he cited *Rex v. Justices of Leicester* (b).

If the return to a writ of mandamus be not void on the face of it, its validity must be regularly discussed on a concilium, and the Court will not order the return to be taken off the file, on the ground of its being a contempt of Court, as disclosed by affidavits.

*Thesiger* (with whom were *Talfourd* Serjt. and *T. F. Ellis*), now shewed cause. The Attorney-General obtained this rule on the authority of *Rex v. Justices of Leicester* (b), in which case it is clear no good return could be made. Here the return is good on the face of it, as appears by the decision of the Court in *Rex v. Round* (c), but affidavits were read to shew that it is contemptuous. Therefore the Court is asked to treat a return as void, because certain facts are stated in affidavits.

The COURT then called upon

(a) See *Rex v. Payn*, 1 N. & P. 524. (c) 4 A. & E. 139; 5 N. & M. 427.

(b) 7 Dow. & Ry. 708.

1838.  
  
 The QUEEN  
 v.  
 PAYN.

Sir *J. Campbell* A.G., Sir *W. W. Follett* and *F. Robinson*, *contra*. This return, in fact, sets the former order of the Court at defiance. The writ in this case orders specific books to be deposited, and therein it differs from *Rex v. Round* (a), where the order was general. In *Rex v. St. Katherine Dock Company* (b), the Court held it discretionary to determine the validity of a return on a motion or on a concilium. It is not enough to say that on the face of it the return may be good. A sham plea may be good upon the face of it, but still if it has been manifestly pleaded for the purpose of delay, the Court allows judgment to be signed at once. In *Willcock on Corporations* (c) it is laid down as to a return, "if it attempt to shew an incapacity to obey the writ by reason of the change of circumstances, it must appear that there was no fraud or stratagem on the part of the defendant." So in *Bac. Abr. Maudamus* (I), it is said that a return must be certain in every respect. In *The King v. Robinson* (d), a return was made, and the Court, thinking the return frivolous, made a rule absolute for an attachment; the present is a milder course to adopt.

LORD DENMAN C. J.—A return like this ought to come on in the regular way, and be set down in the crown paper.

LITLEDAL J.—In *Rex v. Round* (a), *Patteson* J. intimated his opinion, that a return like the present was good, but whether it is so or not, it clearly is a question of law that ought not to be discussed on motion.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged without costs (e).

(a) 4 A. & E. 139; 5 N. & M. 427.

(b) 4 B. & Ad. 360; 1 N. & M. 121.

(c) P. 406, pl. 186.

(d) 8 Mod. 336.

(e) See note (b) to *Rex v. Round*, 5 N. & M. 427.

1838.

Tuesday,  
January 30th.

The QUEEN v. The Inhabitants of BARMSTON.

ON an appeal against an order of two justices, removing *Jane Allman*, widow, and her children, from the parish of Beeford to the parish of Barmston, the quarter sessions of the East Riding of Yorkshire confirmed the order, subject to the following case:

*Gregory Allman*, the pauper's late husband, was the son of *Wm. Allman* the elder, of the township of Lissett, in the East Riding of the county of York, tailor (now deceased). At Martinmas, 1811, *Gregory Allman* hired with one *James Hyde*, a farmer, of the parish of Barmston, for one year, at yearly wages, and served the entire year in that parish, and before the end of that year he again hired with the same master for a year, from the next Martinmas, and served a second year in the same parish, at the end of which time, receiving a serious injury from the kick of a horse, which disabled him from performing the duties of a farmer's servant, he went back to his father's house at Lissett. Afterwards, by a certain indenture of apprenticeship, *Gregory Allman*, then a minor, put himself apprentice to his father, to learn his trade of a tailor. The indenture was produced at the trial; it appeared to be attested by two witnesses, one of whom was at the time of the trial in America, and the other attesting witness was called. At the time of the execution nothing passed with respect to the hereinafter mentioned alterations. This indenture at first bore date the 12th of December, 1813, and was for seven years, but afterwards and before it was executed (but how long before did not appear), the parties, for the fraudulent purpose of enabling *Gregory Allman* to exercise the trade of a tailor, and have the full benefit of the stat. 5 Eliz. c. 4 (then in force), in that respect, after a five years' apprenticeship, as fully as if he had served seven years, as required by that statute, caused the date of the indenture to be altered, the year of the reign of King George the Third, from 53d

A minor, by an indenture of apprenticeship, put himself apprentice to his father, to learn the trade of a tailor. The indenture first bore date 12th Dec. 1813, but the parties, for the fraudulent purpose of enabling the minor to exercise the trade of a tailor, and have the full benefit of the 5 Eliz. c. 4, (then in force,) after five years' apprenticeship, caused the indenture, before execution, to be antedated two years; on an appeal, touching the validity of this indenture, held, that as it was fraudulently intended to contravene 5 Eliz. c. 4, s. 31, it was altogether void, although the appellant parish was no party to the fraud.

1838.  
  
 The QUEEN  
 v.  
 Inhabitants of  
 BARMSTON.

to 51st, and the year 1813 to the year 1811, and the figures 1811, in the body of the indenture, were written over a line which had previously occupied the blank space in which they were introduced. *Gregory Allman* served his father in *Lissett* under this indenture for five years, and afterwards served him as journeyman at intervals until his father's death, 1820. There was no evidence at the trial of the appeal, to shew that the appellant parish was a party to the alterations of the indenture. From the circumstances above stated, the Court of Quarter Sessions held this indenture to be fraudulent and void. The question for the opinion of the Court is, whether *Gregory Allman* gained any settlement in *Lissett*, by serving his father there, under the circumstances above mentioned; if he did, then the original order and the order of sessions are to be quashed; if he did not, then the order of sessions is to be confirmed.

*Alexander* and *Archbold*, on a former day in this term (a), were heard in support of the order of sessions. The question in this case is, whether the indenture of apprenticeship, having been executed in fraud, and for a period less than seven years, is not void under 5 *Eliz.* c. 4. In certain cases it has been held, that indentures not executed according to that statute, are voidable only. Thus in *Rex v. St. Nicholas, Ipswich* (b), where the pauper was bound for four years, and served during that time, it was held that the indentures were voidable only; and the same point was ruled in *Rex v. Evered* (c), and *Gray v. Cookson* (d), but in none of those cases was there any attempt at fraud, or to evade the statute. In those cases also, ss. 26 & 41 of 5 *Eliz.* only were considered. But in this case, sect. 31 is directly contravened, which enacts "that it shall not be lawful for any person to use or exercise any art &c., except he shall have

(a) Saturday, Jan. 20th, before  
 Lord Denman C. J., *Littledale*,  
*Williams* and *Coleridge* Js.

(b) Burr. Sett. Ca. 91; 2 Str.  
 1066.

(c) Cald. 26.

(d) 16 East, 13.

been brought up therein seven years at the least, as an apprentice, upon pain that every person willingly offending or doing the contrary, shall forfeit forty shillings for every month." The contract therefore attempted to be entered into is expressly prohibited by the statute, and is consequently void; *Rex v. Gravesend* (a), *Rex v. Hipswell* (b). It is true that in the former case the present statute was distinguished from the act then under consideration, but sect. 31 of the 5 *Eliz.* c. 4, (which does not appear to have been then noticed,) is exactly the same in effect as those sections on which the judgment of the Court proceeded. The proper construction of the word *void* is to give it its full meaning, when the purpose contemplated by the statute is the protection of the public, and not the interests of parties only, and this is the construction adopted by the Courts. Thus on the 8 *Ann.* c. 9, s. 39, if the indenture is not made according to the provisions of the statute, it is held to be absolutely void; *Jackson v. Warwick* (c). It was contended at the sessions, that as the alteration was improperly made, the indenture was good in its original terms, according to the decision in *Henfree v. Bromley* (d), where the umpire made his award and gave notice of its being ready for delivery, but afterwards made an alteration in the sum awarded; and the Court held that the alteration was a nullity, and that the award was good for the original sum. But there the arbitrator was *functus officio*; in this case, the alteration was made before the indentures were executed. The only remaining question is, whether a case of fraud does not sufficiently appear. The sessions have expressly found fraud, and the facts which they state leave no doubt that their finding is correct.

*R. C. Hildyard*, contrâ. The two questions in this case have been confounded on the other side, viz. whether there was a good binding without the fraud, and if it was good,

(a) 3 B. &amp; Ad. 240.

(c) 7 T. R. 121.

(b) 2 Mann. &amp; Ry. 474; 8 B.

(d) 6 East, 309.

&amp; C. 466.

1838.

  
The QUEEN  
v.  
Inhabitants of  
BARMSTON.

1838.

The QUEEN  
v.  
Inhabitants of  
BARMSTON.

whether the fraud would vitiate it. On the first question, the alteration of the dates is immaterial. According to *Comyn* (a), "the date is not essential to a deed; for if it has no date, or a false or impossible date, the deed shall be good, and take effect from the time of the delivery." The indentures therefore are good to create an apprenticeship for five years. The decisions, in which indentures, not according to the 5 *Eliz.* have been held voidable only, beginning with *Rex v. St. Nicholas, Ipswich* (b), were well considered, and have always been sustained. *Rex v. Gravesend* (c) and *Rex v. Hipswell* (d), which have been cited on the other side, are most material to support *Rex v. St. Nicholas, Ipswich* (b). In *Rex v. Gravesend* (c), Lord *Tenterden* C.J. expressly distinguished the 5 *Eliz.* from the statute then under consideration, on the ground that the clauses respecting apprenticeship in the former statute were permissive only, and he confirmed the decision in *Rex v. St. Nicholas, Ipswich* (b). This Court has merely confirmed Lord *Tenterden*'s distinction in *Rex v. St. Gregory* (e); and Lord *Denman* C. J. expressly said that *Rex v. Hipswell* (d) and *Rex v. Gravesend* (c) do not overrule the former cases. On these authorities the Court will continue to support *Rex v. St. Nicholas, Ipswich* (b). Again; the 54 *Geo. 3.* c. 96, repealed the provisions as to the time of apprenticeship contained in 5 *Eliz.* c. 4, and the intention of the act was to give a retrospective validity to indentures otherwise voidable. The indenture therefore being voidable merely, according to the decisions, or rendered valid by the 54 *Geo. 3.* c. 96, the question remains whether the finding of the sessions, that it is fraudulent, renders it void. When the sessions find fraud generally, that is a fact of which this Court cannot judge; but when the sessions state the facts from which they infer fraud, this Court will decide whether their

(a) Com. Dig. Fait. (B 3.)

(b) Burr. S. C. 91.

(c) 3 B. &amp; Ad. 240.

(d) 8 B. &amp; C. 466; 2 Mann. &amp; Ry. 474.

(e) 2 A. &amp; E. 99; 4 N. &amp; M. 137.

inference is proper or not: *Rex v. Tedford* (a). It is said that fraud, *ab initio*, vitiates every contract; but that is too general a proposition. Suppose a party makes a bonâ fide conveyance of forty shillings a year in fee, and antedates it fraudulently, for the purpose of giving a vote for the current year, under the provisions of the Reform Act;—so far as the purpose contemplated is considered, it would be defeated on the facts coming to light; but in the following year, on what ground could the revising barrister hold the conveyance to be void? Suppose again, for the purpose of conferring a vote by creating a tenancy for sixty years, a lease for fifty years were granted, and in the demise sixty years were fraudulently inserted instead of fifty, and under that lease 30*l.* per annum were actually paid; could this Court hold, that under that tenancy a settlement would not be gained? Although there may have been fraud in the concocting this apprenticeship, the parishes were not parties to it; and therefore, as against them, the Court will not hold the indentures to be void. This principle has been laid down in several cases; *Rex v. Kilby* (b), *Rex v. Great Sheepy* (c), *Rex v. Great Glenn* (d). In *Rex v. Geddington* (e), Bayley J. said, “In cases relating to the law of settlement, the manner of determining any particular point is not so important as it is that the decisions should be uniform and consistent.” This is a strong argument for adhering to *Rex v. St. Nicholas, Ipswich* (f), and the other decisions. [Lord Denman C.J. In *Grant v. Welchman* (g) it was held, that an indenture of apprenticeship, which had been antedated so as to make it appear an apprenticeship for seven years, was only voidable; but that was decided on the authority of *Gray v. Cookson* (h), which is distinguishable from the present case; for suppose the apprentice here had

1838.

The QUEEN  
v.  
Inhabitants of  
BARMSTON.

(a) 2 Const's Bott, 505; Burr. S. C. 57.

(b) 2 M. & S. 501.

(c) 8 B. & C. 74; 2 Mann. & Ry. 286.

(d) 5 B. & Ad. 188.

(e) 2 B. & C. 129; 3 D. & R. 403.

(f) Burr. S. C. 91.

(g) 16 East, 207.

(h) 16 East, 13.

1838.  
  
 The QUEEN  
 v.  
 Inhabitants of  
 BARMSTON.

run away from his father, and the father had sought to proceed against him before the justices, he could not have enforced the indentures.] The indentures in that case might be avoided, on the application of the apprentice.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—The question in this case was, whether a settlement was gained by apprenticeship; the only material facts as to which were the following:—The pauper put himself apprentice to his father, by an indenture which at first bore date the 12th December, 1813, and was for seven years; but afterwards, and before it was executed, (how long it did not appear,) the parties, for the fraudulent purpose of enabling the pauper to exercise the trade of a tailor, and have the full benefit of the statute 5 *Eliz. c. 4*, (then in force,) in that respect, after a five years' apprenticeship, as if he had served seven, caused the date of the indenture to be altered from the 53d *Geo. 3* to the 51st, and the year 1813 to 1811, and the figures 1811, in the body of the indenture, were written over a line which had previously occupied the blank space into which they were introduced. Under this indenture there was a sufficient service to gain a settlement. And if, as was contended, the result of this statement was that the pauper was bound for five years only, we should not have disturbed the rule of law laid down in *Rex v. St. Nicholas, Ipswich* (a), and so many other decisions. We think, however, that the state of the case is very different. The sessions have found a fraudulent purpose, and the facts from which they arrived at that conclusion. And although, as was contended by the learned counsel in support of the rule (and not denied on the other side), as the grounds of the finding are stated, this Court may examine into its correctness; yet it is equally certain that it will sustain the conclusion of the sessions

(a) Burr. S. C. 91.

where that can be reasonably done; and we think it may in the present instance.

When the near relation of the parties is considered, and moreover, that there was a purpose of evading the statute, which certainly prohibits the carrying on a trade, except by a person who has served an apprenticeship of seven years, under a penalty,—we are of opinion that the sessions were well warranted in concluding that the indenture was, by the facts disclosed, avoided.

A doubt was suggested, upon the language attributed to Lord *Hardwicke*, in the case of *Rex v. Tedford* (a), whether this was a species of fraud into which the sessions could inquire, as it respected the conduct of the parties themselves to the contract, and not of either of the contending parishes. When, however, the real character of a transaction, which may be apparently regular, is a question, we cannot see how the conduct of the parties, upon which the whole depends, can be withdrawn from consideration; and do not find that any such distinction as that above alluded to has been observed. And accordingly, in the case of *The King v. The Inhabitants of Gravesend* (b), where the indenture was regular upon the face of it, facts were proved in order to shew that an evasion of a statute, prohibiting the master (a waterman) from taking more than two apprentices, was intended, and the indenture was avoided thereby. We think therefore that the sessions were warranted in drawing the conclusion of fraud; that the indenture was therefore void; and that their order should be confirmed.

1838.  
The QUEEN  
v.  
Inhabitants of  
BARMSTON.

Order of Sessions confirmed.

(a) 2 Const's Bott, 505.

(b) 3 B. & Ad. 240.



1838.

Friday,

January 19th.

To prove the extent and rights of a manor, which had formerly been parcel of the duchy of Lancaster, a document produced from the duchy office was tendered in evidence, purporting to be a survey of the manor, made in the 33 *Eliz.* while the manor belonged to the duchy, by the deputy surveyor of the duchy, founded on the presentment of the tenants of the manor, at a court of survey, and it appeared that Queen *Elizabeth* had paid the expenses of the survey:—Held to be inadmissible, either as a document made under public authority, or as evidence of reputation.

EVANS v. TAYLOR.

**TRESPASS** for breaking and entering the plaintiff's closes, covered with water, situate in the parishes of Elmore, Quedgley, and Minsterworth, and for fishing therein and taking away the fish. Pleas: not guilty; and several pleas of justification. At the trial, before Lord *Denman* C. J., at the Gloucestershire summer assizes, 1835, it appeared that the plaintiff claimed, as lady of the manor of Minsterworth, an exclusive fishery for all kinds of fish in the river Severn within the boundary of her manor. The Severn divided the manors of Minsterworth and Elmore. The plaintiff's general right was proved at the trial, but the defendant claimed a right to fish for lamperns, as appurtenant to his land, which was situate on the Elmore side of the river; and he also contended that if the plaintiff's right of fishing extended over the whole stream, the manor of Minsterworth extended only *usque ad medium filum aquæ*, according to the custom stated in *Hale De Port. Mar.*(a) It appeared also that the manor of Minsterworth had formerly been parcel of the possessions of the duchy of Lancaster, but that it had been severed from the crown in the reign of *James 1*, who had sold it to certain persons, through whom it had vested in the plaintiff. In order to prove the extent of the manor of Minsterworth, the plaintiff produced from the office of the duchy of Lancaster, a document, headed

"Gloucestershire, the Manor of Minsterworth,"

And purporting to be "a survey thereof, taken the 25th of October, in the 33d year of our Sovereign Lady Queen *Elizabeth*, &c. by *John Northe*, gentleman, deputie unto Sir *John Poyntz*, knight, generall surveyor of the duchy of Lancaster, lying on the south parts, by the authorities aforesaid, and proved by the oathes and presentments of such of the tennantes of the said manner, as hereafter follow."

The names of twenty persons were then set out, who were described to be the jurors of the court of survey,

(a) Printed in Harg. Law Tracts, 7.

who presented the boundaries of the manor, and stated, amongst other matters, the rents paid for fishing in the Severn, and the boundaries within which the fishery "doth belong unto her majesty," within which divers of the "tenants of Elmore do fish, where by right they ought not, which is to the great prejudice and hinderance of the tenants of the said manor." This document was signed "*Jno. Selman, Cl. Concil. Ducat. Lancast<sup>re</sup>.*" No inquiry or commission for the making this survey was produced, but it appeared that Queen *Elizabeth* had made an order for payment of the expenses of the survey. On objection made by the defendant to the admission in evidence of this document, his lordship refused to receive it. The verdict having passed for the defendant,

1838.  
  
 EVANS  
 v.  
 TAYLOR.

*Talfourd* Serjt., in Michaelmas term (a), 1835, moved for a new trial, on the ground that this evidence was improperly rejected, and that the verdict was against the evidence received. On the first point he cited *Rowe v. Brenton* (b), *Nicholls v. Parker* (c), *Freeman v. Phillipps* (d), *Crease v. Barrett* (e), and *Drinkwater v. Porter* (f).

*Ludlow* Serjt. and *R. V. Richards*, in Hilary term, 1837 (g), shewed cause. It did not at all appear by whose authority this survey was made. There was no commission proved to authorize it. It clearly amounts either, 1st, to a title-deed, and is then merely a private document; or 2d, it is a document *publici juris*, in which case proof of a commission is necessary to authenticate it. In *Rowe v. Brenton* (b), an extent of crown lands, from the Lord Treasurer's Remembrancer's Office, was received, but there the evidence as to

(a) Nov. 4, before Lord Denman C. J., *Patteson, Williams and Coleridge* Js.

(b) 8 B. & C. 737; 3 M. & R. 164.

(c) Cited 14 East, 331, in note to *Doe v. Thomas*.

VOL. III,

(d) 4 M. & S. 486.

(e) 1 C. M. & R. 919.

(f) 7 Car. & Pay. 181.

(g) Jan. 17, before Lord Denman C. J., *Williams and Coleridge* Js; *Littledale* J. was absent from indisposition.

N

1838.  
  
 EVANS  
 v.  
 TAYLOR.

the custody was more precise than in this case, and there also the rights of the crown were in some degree in question. [Coleridge J. Could this survey have been evidence, whilst the manor remained in the crown, and not continue to be so?] There may be such a distinction. But this survey would not be receivable in either case; it was a document of a private nature altogether.


*Talfourd Serjt., Shepherd and Lumley, contra.* The document was admissible either as a survey made under the authority of the crown, or as a declaration by the tenants respecting the boundary of the manor. I. The document was produced from the proper custody; having been prepared while the manor belonged to the crown, it remained as a matter of course in the duchy office. [Lord Denman C. J. We do not feel pressed with the argument founded on the custody of the document.] Coming, then, from proper custody, it is receivable in like manner with the extent of crown lands, which was admitted in evidence in *Rowe v. Brenton (a)*. Bayley J. held in that case, that it would have been a breach of duty in the officer of the Exchequer to suffer a document to be there received, which had not been duly taken; and therefore that the presumption arose that it was duly taken. The argument, therefore, as to there being no commission, falls to the ground. [Coleridge J. I do not see what necessity there could be for a commission, it was the duty of the surveyor to make the survey by virtue of his office.] It was also evidence as a survey relating to crown lands. By the statute 4 *Edw.* 1, st. 1, intituled *Extentu Manerii*, continual surveys of the possessions of the crown are directed to be taken. This survey appears to have been made in compliance with that statute. In *The Vicar of Kellington v. Trinity College (b)*, an extent was received without the proof of any commission having issued.

II. The document, as a declaration by the tenants of the manor, was evidence of reputation as to the boundary;

(a) 8 B. & C. 737; 3 Mann. & Ry. 164.

(b) 1 Wils. 170.

*Nicholls v. Parker* (a), *Freeman v. Phillipps* (b), *Barnes v. Mawson* (c). *The Duke of Newcastle v. The Hundred of Broxtowe* (d), is an authority to shew how far the orders of justices, on a question of boundary, are evidence of reputation of a fact within their jurisdiction. Reputation, as a matter of public interest, being admissible, it is quite immaterial whether it has the effect of enlarging or of curtailing the public rights; *Drinkwater v. Porter* (e), *Crease v. Barrett* (f).

1838.  
  
 EVANS  
 v.  
 TAYLOR.

*Cur. adv. vult.*

LORD DENMAN C. J., on this day, delivered the judgment of the Court.—On the trial of this cause before me at Gloucester, I rejected a document tendered in evidence, as to the admissibility of which we have entertained considerable doubt. It was the survey of the manor of Minsterworth, parcel of the possessions of the duchy of Lancaster, made by a person named “deputy to Sir *J. Poyntz*, surveyor, appointed by Queen *Elizabeth*, on the finding of certain tenants of the manor, at a court of survey.” The evidence was tendered to shew what were the boundaries of the manor. The action was in trespass on plaintiff’s close, covered with water; on her free fishery; and on her several fishery; with a count for trespass in carrying away plaintiff’s fish. Besides the general issue, defendant placed several justifications on the record, but the only one on which the trial proceeded was, that defendant, and all those who held his messuage and tenements (abutting on the locus in quo) for sixty years, had and enjoyed the privilege of fishing for lamperns in the locus in quo. The replication stated, that plaintiff, as lady of the manor of Minsterworth, and all those who &c., had enjoyed, from time beyond memory, the sole and several privilege of fishing on the close, which was the river Severn at that spot.

(a) 14 East, 331, n.

(b) 4 M. & S. 486.

(c) 1 M. & S. 77.

(d) 4 B. & Ad. 273; 1 N. & M. 598.

(e) 7 C. & P. 181.


(f) 1 C. M. & R. 919.

1838.  
  
 EVANS  
 v.  
 TAYLOR.

This right being traversed, it was necessary to shew that the locus in quo was in the manor of Minsterworth, and the survey was tendered for the purpose of proving it. On the argument before us, the admissibility of this document was mainly rested on the authority of *Rowe v. Brenton* (a), where the Court admitted a document purporting to be an extent of the manor of Tewington, temp. *Edw. 3*, by the steward of the king's land, on this side Trent. They decided that the statute applied to the possessions of the duchy, as well as to those of the crown. Whether the statute authorized more than one survey to be made was not argued, but assuming that this ought to be done from time to time, the Court very reasonably inferred from the form and contents of the document, that it was an act of official duty prescribed by that statute. The question turned there wholly on the right of the conventional tenants of lands, in certain manors belonging to the duchy, to minerals there found. The document stated the privileges enjoyed by such tenants; now the 8th section of the statute 4 *Edw. 1*, directs inquiry to be made of freeholders, services, value and rent, whether they follow the county court, and what heriots are payable to the lord; and the 9th section directs inquiry "also of customary tenants, that is, to wit, how many there be, and how much land every one of them holdeth, what works and customs he doth, and what the works and customs of every tenant be worth yearly, and how much rent of assise he paid yearly, besides the works and customs, and which of them may be taxed at the will of the lord, and which not." The Court, considering that this document conveyed direct information on the very point in issue, and might, on the grounds above stated, have been in exact conformity with the aforesaid statute, were surely well warranted in holding the instrument authentic and legitimate. It is however remarkable, that this statute de Extenta Manerii does not contain the word *manor*, though no doubt that species of property is within

(a) 8 B. & C. 737; 3 Mann. & Ry. 164.

it. But it gives no power to define boundaries of manors. The report then of the deputy surveyor, that the tenants of a particular manor had at a court of survey found its boundaries, is a statement which they were not authorized by this statute to make, nor he to receive. And the contents of this document do not bring it within the description of proceeding enjoined by this statute. If this be so (and I may observe that *Rowe v. Brenton* (a) was never mentioned at nisi prius), we must now examine the argument which was then pressed on my consideration. It was contended, that though the proceeding of Sir John Poyntz's deputy might have no legal authority, yet the reported declaration of the tenants of the manor must be considered good evidence, as shewing the reputation of that time in respect of its boundaries. *Freeman v. Phillipps* (b) and *Crease v. Barrett* (c), were cited to this effect. But in the former case there had been an actual suit in the Exchequer; depositions then taken of persons representing the same interest as that of defendant *Freeman* were produced. The only presumption then that the Court had to make was, that these were real parties to the suit, and that they made the depositions actually sworn to in their names. In the latter case no doubt existed that similar depositions, made by conventional tenants, in answer to interrogatories, were the real statements of parties actually interested in a pending proceeding, though the nature of it (owing to the loss of the commission) could not be ascertained. A similar presumption of verity in the proceedings, was the only thing here required to make the depositions good evidence. The present case is entirely different, for the deputy surveyor of the duchy does not appear to have had any authority to institute the inquiry, and, stripped of this authority, he has not merely no right to make any kind of return, but the presumption that he did make it falls to the ground. The paper may have been written by any clerk idling in the office, from his own

1838.  
  
 EVANS  
 v.  
 TAYLOR.

(a) 8 B. & C. 737; 3 Mann. & Ryb. 164.

(b) 4 M. & S. 486.

(c) 1 C. M. & R. 919.

1838.  
  
 EVANS  
 v.  
 TAYLOR.

imagination, or compiled, possibly, by some interested person, in furtherance of a sinister object of his own. From these considerations, it appears that the document was no evidence for any purpose.

Rule discharged.

Tuesday,  
 January 23d.

MOORE v. RAMSDEN, Clerk.

The defendant, who was a beneficed clergyman, granted, in 1813, an annuity, which he charged on his rectory of S., demising it for a term of years to a trustee. In 1825 this and other annuities, with the terms thereby created, were

**SIR W.W. FOLLETT**, in Trinity term, 1836, had obtained a rule calling upon the plaintiff to shew cause why the warrant of attorney in this cause, judgment and sequestration, should not be set aside, on the ground that the warrant of attorney was given to secure an annuity, and with intent that sequestration might issue, charged on the ecclesiastical benefices of the defendant, and that the sequestration is kept on foot as a charge upon the said benefices.

It appeared by the affidavits that the plaintiff, who was rector of Great Stambridge, and vicar of Little Wakering, in Essex, in 1813 had granted to *E. F.* an annuity of 260*l.*,

by deed transferred to the plaintiff, on his advancing 4400*l.* to take them up, and an annuity of 574*l.* 9*s.* granted him; the defendant, by the same deed, again demised his rectory of S. and also his vicarage of W. for a term, giving power to the plaintiff to sequester the rectory and vicarage respectively, if he should think fit. The deed also stated that the defendant had executed a warrant of attorney, of even date therewith, authorizing the plaintiff to enter up judgment for 8800*l.* (being double the sum advanced), which it was intended should be a collateral security only, and that no execution should issue unless the annuity was in arrear for twenty days. The warrant of attorney recited the deed, which stated the grant of the annuity of 1813, and of the other annuities, and the transfer of them to the plaintiff, and the grant of the annuity of 574*l.* 9*s.*; and "for the further securing of the regular payment of the said annuity or yearly sum of 574*l.* 9*s.*" &c., authorized judgment to be entered up against the defendant in the common form.

In 1832 the plaintiff brought an ejectment to recover the rectory of S., under the term granted in 1813, and in July, 1833, obtained possession. In June, 1833, the annuity being 861*l.* in arrear, the plaintiff sued out a *levari facias*, and sequestered the vicarage of W. A rule nisi having been obtained in Trinity term, 1836, to set aside the warrant of attorney, on the ground of its being a charge on a benefice, and the sequestration, on the ground of its being kept in force to satisfy arrears subsequently accruing, all arrears due at the time of the sequestration issuing having been paid out of the proceeds of S.:—Held,

1st. That the warrant of attorney was not void, as it did not in terms charge the benefice.

2nd. That the sequestration was valid, as the plaintiff was entitled to appropriate the profits of S. to the new arrears of the annuity, and to keep the sequestration on foot till the old arrears of 861*l.* were levied out of W.

which he secured by a demise of his rectory to a trustee for her, for ninety-nine years. In 1816 he granted to *T. H. F.* an annuity of 93*l.*, which he also secured by a demise of his rectory. In 1820 he granted to *T. G.* an annuity of 80*l.*, which he secured by a demise of the vicarage to a trustee. In 1823 he granted to *B. F.* an annuity of 200*l.*, which he secured in like manner on both the rectory and the vicarage. In 1825, by an indenture of fourteen parts, these several annuities, and the different terms created by them, were assigned to the plaintiff, as chairman of the British Annuity Company, who thereupon advanced to the defendant the sum of 4400*l.* for the purpose of taking them up. The deed then contained a grant to the plaintiff of an annuity of 574*l.* 9*s.*, with power to enter and distrain upon the rectory and vicarage upon any quarterly payment being in arrear for twenty-one days, and to take the rents and profits. It also contained a demise of the rectory and vicarage, for one hundred years, to a trustee for the Company, and also gave power to the Company to sequester the rectory and vicarage respectively, if they should deem it necessary, if the annuity were unpaid for thirty days. The deed also stated that the defendant had executed a warrant of attorney, of even date therewith, authorizing the plaintiff to enter up judgment for 8800*l.*, and that it was intended the judgment should be a collateral security only for the better payment of the annuity; and that no execution should be issued out upon the said judgment unless a quarterly payment of the annuity should be in arrear for twenty days. The defendant also covenanted, that on the annuity being in arrear twenty days, it should be lawful for the plaintiff to issue out execution upon that judgment for the recovery of the arrears of the said annuity. The warrant of attorney, after reciting the deed of fourteen parts and the assignment of the different annuities to the plaintiff, and the grant of the annuity to him of 574*l.* 9*s.*, proceeded thus: "now therefore, for the further securing of the regular payment of the said annuity or yearly sum of 574*l.* 9*s.*,

1838.  
  
 MOORE  
 v.  
 RAMSDEN.

1838.  
  
 MOORE  
 v.  
 RAMSDEN.

these are to desire and authorize you, the said attornies," &c.—concluding in the common form, with an authority to enter up judgment against the defendant for 8800*l*.

Judgment was entered up against the defendant on this warrant of attorney on 3d March, 1825. In 1833 the annuity to the plaintiff having fallen in arrear, a *levari facias* was issued out, indorsed to recover the sum of 86*l*. 13*s*. 6*d*. arrears, upon which writ the Bishop of London granted a sequestration of the vicarage of Little Waking. In March, 1836, the defendant took the benefit of the Insolvent Debtors' Act. By the affidavits in answer it appeared, that the principal facts in the above affidavits had been brought before the Court on the former application in this case, when the Court refused to set aside the warrant of attorney and sequestration (*a*). After this decision of the Court, the Company, in 1832, brought an ejectment for the rectory of Great Stambridge, and recovered a verdict thereon, and obtained possession in 1833 (*b*). The affidavits also stated that the net amount of the monies received on the sequestration of Little Waking had not exceeded the sum of 20*l*. 7*s*. 6*d*., and that all the monies received from the defendant and from the profits of the two benefices were insufficient to discharge the arrears of his annuity.

*Kelly* and *Channell* shewed cause in Trinity term last (*c*). With the exception of the fact of the defendant's insolvency, the whole of this case has been before the Court already, and disposed of. In Michaelmas term, 1831, a rule was obtained to set aside the warrant of attorney and the sequestration, on the ground that the former was a charge upon the ecclesiastical benefices of the defendant; and in Hilary term, 1832, the Court discharged that part of the rule which


(*a*) 3 B. & Ad. 917, n.

(*b*) *Doe d. Moore v. Ramsden*,  
 1 N. & M. 489; S. C. nom. *Doe*  
*d. Wilks v. Ramsden*, 4 B. & Ad. 608.

(*c*) May 22nd, before Lord Den-  
 man C.J., *Littledale, Patteson*, and  
*Williams*, Js.

sought to set aside the warrant of attorney, and referred it to the Master to ascertain whether any more had been received under the sequestration than the arrears due (*d*). This is an attempt therefore to open a rule, which the Court will not permit: *Rosset v. Hartley* (*a*). The additional fact of the defendant having taken the benefit of the Insolvent Act, is quite immaterial; for in *Bishop v. Hatch* (*b*), where the question was fully discussed, it was decided that a benefice does not pass by the assignment under the Insolvent Debtors' Act, 7 Geo. 4, c. 57. Supposing it, however, to be a new question, the rule must be discharged. It asks two things; first, that the warrant of attorney should be set aside, as a charge on an ecclesiastical benefice; second, that the sequestration should be set aside, on the ground of its being a continuing charge.

I. Although a warrant of attorney may be given for the express purpose of creating a charge upon a benefice, the Court will not set it aside, unless it does in terms and in fact create a charge upon the living, contrary to the provisions of 13 Eliz. c. 20. In *Colebrook v. Layton* (*c*), where it clearly appeared that the warrant of attorney was given for the purpose of creating a charge upon the benefice, the Court refused to set it aside, because it did not in fact create a charge different to what any other judgment creditor could obtain. This also was the principle of the decision of the Court on the former discussion of this case: *Moore v. Ramsden* (*d*), and in other cases;—*Britten v. Wait* (*e*), *Johnson v. Brasier* (*f*), *Saltmarshe v. Hewett* (*g*). In *Johnson v. Brazier* the defeasance on the warrant of attorney did state that it was given to secure an annuity granted by the defendant; but the Court would not call for the deeds to ascertain whether the deeds granting the annuity were valid

1838.  
  
 MOORE  
 v.  
 RAMSDEN.

First point:  
 A warrant of attorney, given to charge a benefice, is not void, unless in terms it creates a charge.

(*a*) 5 N. & M. 415.

(*b*) 1 A. & E. 171; S. C. 3 N. & M. 498.

(*c*) 4 B. & Ad. 578.

(*d*) 3 B. & Ad. 917, n.

(*e*) 3 B. & Ad. 915.

(*f*) 3 N. & M. 654.

(*g*) 3 N. & M. 656.

1838.

MOORE

v.

R.

RAMSDEN.

or not. In the present case it does not at all appear from the warrant of attorney that it is given as a charge on the benefices, and it is expressly stated that it is only given as a collateral security.

Second point :  
A sequestration will not be set aside, if it appears that any part of the arrears is unsatisfied.

II. There is no ground for setting aside the sequestration. In the former case (a) the Court would not allow the sequestration to stand, because it appeared that no arrears were due of the sum for which it issued; but it appears here, by the affidavits, that the monies received under this sequestration have not been sufficient to satisfy the sum indorsed on the *levari facias*.

Sir *W. W. Follett*, *contrà*. This is a different case, with a different state of facts, from the former case of *Moore v. Ramsden* (a). The sequestration there was of both the livings; in this case it is only of Little Wakering. The rule referred to therefore does not apply:

First point.

I. The principle of the decision in *Saltmarshe v. Hewett* (b) governs this case. There the warrant of attorney was stated to be given as a collateral security only, which is a point relied on here, and it directed judgment to be entered up, and execution to issue, if the annuity should be in arrear. The Court, however, held that "enough appeared to shew the warrant of attorney was given to charge the benefice." Can there be any doubt, on looking at this warrant of attorney, that it was also given as a charge? In *Johnson v. Brasier* (c), the warrant of attorney was in the common form, and there was nothing in it to shew that there was a charge on the benefice.

Second point.


II. Even if the warrant of attorney be held good, the sequestration must be set aside, for it is clearly kept up as a continuing charge. The plaintiff states that only £2011. has been recovered under the sequestration of Little Wakering; but he has recovered the rectory of Great Stambridge by ejectment, and he therefore may have re-

(a) 3 B. & Ad. 917, n.

(c) 3 N. & M. 654.

(b) 3 N. & M. 656.

ceived from that benefice sufficient to make up, with what he has received under the sequestration, the whole 861/. It is clear therefore the sequestration is continued to satisfy arrears accruing since it issued.

1838.  
  
 MOORE  
 v.  
 RAMSDEN.

*Cur. adv. vult.*

Lord DENMAN C. J. on this day delivered the judgment of the Court.—In this case it appeared, that in 1813, i. e. in the interval between the 43 & 57 Geo. 3, when the 13 Eliz. was repealed, the defendant being the incumbent of the rectory of Stambridge, in consideration of a loan from plaintiff, agreed to charge his said living with an annuity, and to demise it, in case of non-payment, to a trustee for plaintiff, for securing both such payments as might then be due, and such as might thereafter become due. Under this deed the trustee recovered by ejectment, in 1833, possession of the rectory, and has received the profits thereof for the plaintiff's benefit. In 1825, when the repeal of 43 Geo. 3 had restored the operation of 13 Eliz., defendant, in consideration of further advances, granted another annuity to plaintiff, and secured it both on the rectory and on another living, of which he was incumbent, viz. Little Wakering. One of the instruments executed by defendant on that occasion was a deed of fourteen parts, demising the living, authorizing plaintiff to enter upon the premises and distrain for the annuity, and to sequester the living: it recited the intention to execute a warrant of attorney, of even date, as a collateral security only for the better payment of the annuity, that no execution should issue until after twenty days' default, but that in such case it should be lawful for plaintiff to sue out such execution or executions as he should think fit. The warrant of attorney expressly refers to the annuity deed, reciting these provisions, after a statement of the negotiations between these parties and others respecting money raised for defendant's benefit; and for further securing the regular payment of the annuity, authorizes judgment to be entered up forthwith

1838.  
  
 MOORE  
 v.  
 RAMSDEN.

against him for 3800*l.*, being double the amount of monies advanced by plaintiff to him, or for his benefit; but no power to sequester is either *expressly* given, or by reference to the indenture. And as the whole amount of the arrears due exceeds the profits of the rectory of Stambridge actually received by 200*l.*, the plaintiff has issued execution for this sum, and sequestered Little Wakering to raise it. The defendant obtained a rule for setting aside the warrant of attorney, judgment and sequestration, on the ground that they were charges on an ecclesiastical benefice; and we (i. e. my brothers *Littledale*, *Patteson* and *Williams*, and I,) have heard the case argued.

The very same motion was previously made by the same defendant in the same cause, and in Hilary term, 1832, the rule was discharged by Lord *Tenterden* and my brother *Patteson*. We cannot, however, properly act upon that decision, because the short note of it proves that the facts were not quite correctly brought before the Court, inasmuch as on looking at the warrant of attorney, as set out in the affidavit, we find it to contain no defeasance whatever, and no mention of sequestering, but merely the common authority to enter up judgment for double the sum secured. Such a warrant of attorney has in no case been held a charging of the benefice. And it is unnecessary for us to discuss the decision in *Saltmarshe v. Hewett* (a), or that in *Newland v. Watkin* (b), on which it was in a great measure founded. But as we have been led to a perusal and examination of the numerous cases that have occurred of late years, we think it right to state, that *Newland v. Watkin* (b), which is very shortly reported in 9 *Bing.*, accompanied by no judgment of the Court beyond a direction in what form the rule should be made absolute, is given, with the full argument of the Lord Chief Justice, in the *Law Journal* (c).

The sequestration then of Little Wakering has taken place under a warrant of attorney, which is not a charging

(a) 3 N. & M. 656.

(c) Vol. i. N. S. C. P. p. 177.

(b) 9 *Bing.* 113.

of the benefice. But the application was to set aside the sequestration, on the ground that it had issued for arrears subsequently accruing, all that was due at the time having been paid out of the proceeds of Stambidge. But we think plaintiff has a right to apply these proceeds as he thinks proper, and may keep those latter proceeds on account of the new arrears, while he keeps those of Little Wakering for such as became due before.

The rule must be therefore discharged.

Rule discharged.

PUGH v. GRIFFITH, Esq.

Wednesday,  
Jan. 31st.

**TRESPASS.** The declaration alleged, that the defendant, on the 1st of October, 1835, and on other days and times, broke and entered the dwelling-house of the plaintiff, made a great noise and disturbance, and stayed and continued there for a long time, and broke open and broke to pieces and damaged divers doors of and belonging to the said dwelling-house, and broke to pieces, damaged and spoiled divers locks, bolts, staples, and hinges of the said doors, and wherewith the same were fastened, and seized and took divers goods and chattels, deeds, writings, agreements, and papers of the plaintiff in the said dwelling-house, and carried away the same, and converted and disposed of them to his own use. The defendant pleaded, as to the seizing the deeds, agreements, papers, and writings, not guilty; and as to the residue of the trespasses, that *Robert James* sued and prosecuted out of the Court of Exchequer a writ of fieri facias directed to the sheriff of Montgomeryshire, and commanding him to levy

Where a sheriff was lawfully in a room, occupied by an under-tenant of the plaintiff, in his dwelling-house, and had entered the residue of the dwelling through an open door communicating between the two tenements, in order to seize the plaintiff's goods under a fi. fa.; and, having seized the goods, was unable to carry them away without himself opening the outer door,

which was locked, neither the plaintiff nor any one on his behalf being present whom the sheriff could request to open the door:—Held, he was justified in breaking the outer door and the lock thereof, in order to carry away the goods.

In pleading the above facts as a justification in trespass, it is not necessary for the defendant to aver that the trespass did not happen through his own default; as such a fact should be replied affirmatively by the plaintiff.

1838.

MOORE  
v.  
RAMSDEN.

1838.

PUGH

v.

GRIFFITH.

55*l.* 1*s.* 4*½d.*, which *Jones* had recovered against the plaintiff, which writ was delivered to the defendant, being sheriff of the said county, by virtue of which the defendant, then lawfully being in a certain room in and part of the dwelling-house, and which room was occupied by *Elizabeth Davis*, as tenant to the plaintiff, entered into the residue of the dwelling-house through the door communicating between the room so occupied by *E. D.* and the residue of the dwelling-house, the same being then open, in order to seize and take in execution the goods and chattels being in the dwelling-house for the purpose of levying the said monies, and did seize and take in execution the same, and did levy a part of the said monies; and because certain doors of the said dwelling-house were shut, locked, and fastened with the said locks, bolts, staples, and hinges, so that the defendant could not seize, take, and carry away the said goods and chattels to levy the said monies, or execute the said writ, without forcing and breaking open the said doors, the defendant did force and break open the said doors, and in so doing did necessarily a little break and damage the same, and also a little break to pieces, damage and spoil the said locks, bolts, staples, and hinges, doing no unnecessary damage to the plaintiff, and stayed and continued in the house, &c. The plaintiff joined issue on the plea of not guilty; and as to the second plea newly assigned, that he brought his action not for the trespasses in that plea mentioned, but for that the defendant at the several days and times &c. broke and entered the outer door of the dwelling-house, and broke and entered the dwelling-house on other and different occasions, and at other and different times, and in other and different parts of the said dwelling-house than in the second plea mentioned, which trespasses newly assigned were other and different trespasses. The defendant pleaded to this new assignment, first, as to the trespasses newly assigned, except as to the breaking the outer door of the dwelling-house and entering the same, not guilty; and as to the

breaking and entering the door of the dwelling-house and entering the same, the defendant says, that the writ of fieri facias having been so delivered to the defendant, and he having so entered the dwelling-house to seize the goods, &c., he did seize the said goods; and because the outer door of the dwelling-house was shut and fastened, so that the defendant could not take and carry away the goods in order to levy the money, or execute the writ, without opening the outer door; and because neither the plaintiff, nor any person on his behalf, was in the house, so that the defendant could request the plaintiff or such other person to open the outer door; the defendant, for the purpose last mentioned, did open the outer door, and in so doing did necessarily and unavoidably a little break the same, doing no unnecessary damage to the plaintiff, and the defendant did then take and carry away the said goods for the purpose and in order to levy the monies, and in so doing the defendant did necessarily and unavoidably go out of and re-enter the said dwelling-house by the outer door thereof, the same outer door being open at the time of such re-entry, in order to take and carry away the said goods for the purpose aforesaid. As to the plea of the general issue, the plaintiff joined issue; and as to the second plea to the new assignment the plaintiff newly assigned, that he brought his action not for the trespasses in the introductory part of the second plea to the new assignment, but for that he the defendant, on the several days and times in the declaration and new assignment mentioned, broke to pieces, damaged and spoiled the locks, bolts, staples, and hinges in the declaration mentioned, which locks, bolts, staples, and hinges were appertaining, belonging, and fixed to the outer door of the said dwelling-house, and wherewith the same was fastened. To this second new assignment the defendant pleaded, first, not guilty; second, as to the breaking to pieces, damaging, and spoiling one lock, one bolt, and one staple, parcel of the locks, bolts, and staples in the last new assignment mentioned,

1838.

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PUGH  
v.  
GRIFFITH.

1838.

  
 PUGH  
 v.  
 GRIFFITH.

that the said writ of fieri facias having so issued, and having been so delivered to the defendant, and the defendant having entered, &c. did seize the goods of the plaintiff; and because the outer door was shut and fastened with the said one lock, one bolt, and one staple, so that the defendant could not take and carry away the said goods, or execute the said writ, without opening the outer door, nor could the defendant upon that occasion open the said outer door so fastened as aforesaid without a little breaking, damaging, and spoiling the said lock, bolt, and staple; and because neither the plaintiff, nor any person on his behalf, was in the house, so that the defendant could request the plaintiff, or such other person, to open the said outer door, did open the said door, and in so doing did necessarily and unavoidably a little break to pieces, damage, and spoil the said lock, bolt, and staple there appertaining and belonging to the said outer door, and wherewith the same was fastened, doing no unnecessary damage. To this plea to the second new assignment there was a demurrer, assigning for cause of demurrer, that the defendant by his plea admits and acknowledges the breaking to pieces, damaging, and spoiling the one lock, bolt, and staple, appertaining, belonging, and fixed to the outer door of the said dwelling-house, and wherewith the outer door was fastened; and attempts to justify the same breaking, damaging, and spoiling of the said lock, bolt, and staple, under the execution by virtue of a writ of fieri facias. To this plea to the second new assignment the plaintiff joined in demurrer.

*Jervis* in support of the demurrer. The plaintiff is entitled to judgment on this record. The defendant admits the breaking of the plaintiff's outer door, but shews no sufficient excuse for so doing. From the earliest times it has been held, that a sheriff is not justified in breaking open the outer door of a party in civil process, 13 *Edw.* 4, 9 a; *Semayne's case*(a). It is true that the sheriff avers,

(a) 5 Rep. 91 a.

that he peaceably and quietly entered the plaintiff's house, but he does not allege that he entered through the outer door. Why did he not return the same way by which he came in? If a sheriff gets into a house peaceably, but not through the outer door, he must get out the same way, if the outer door be closed. If, being lawfully in the house, he be locked in, he might be justified in breaking the outer door to get out. But nothing of the kind appears on this record; and it may very well be, that the sheriff having got into the house, locked himself in through clumsiness. It is true that in *Lee v. Gansel* (a), it was thrown out that the privilege of the outer door in execution of even civil process is to be construed very strictly; and that that case has been confirmed by *Hutchison v. Birch* (b), and *Lloyd v. Sandilands* (c), which decided, that, where an officer has entered peaceably through the outer door, he may break open the *inner* doors; he may also break into or enter buildings not parcel of the dwelling-house; *Penton v. Browne* (d). But all these cases point out that the outer door of a dwelling-house is privileged; and the principle of the decisions is, that in the eye of the law a man's house is his castle, which is not to be invaded; *Foster's Discourses on Crown Law* (e); and also, that the security of property under the protection of a dwelling-house is not to be interfered with. In *Buckenham v. Francis* (f), which was trespass for breaking the plaintiff's outer door, and entering his dwelling-house, a similar plea in effect to the defendant's in this case was pleaded; for it stated, as to the breaking and entering the dwelling-house, the delivery of a writ of fi. fa., by virtue of which the defendant peaceably and quietly entered the plaintiff's house to seize &c., and that in so doing the defendant did necessarily make a little noise and disturbance &c. It was contended upon this plea, that it could not be assumed the

1838.  
  
 PUGH  
 v.  
 GRIFFITH.

(a) 1 Cowp. 1.

(b) 4 Taunt. 620.

(c) 8 Taunt. 250.

VOL. III.

(d) 1 Sid. 186.

(e) Disc. II. c. viii. s. 19.

(f) 11 B. Moore, 40.

1838.  
  
 PUGH  
 v.  
 GRIFFITH.

defendant broke the outer door; the plea however was held bad. Admitting, therefore, that the defendant got lawfully into the plaintiff's house, his only justification for breaking the outer door to get out would have been, that the plaintiff locked him in, as in *White v. Willsheire* (a). Breaking an outer door to get out of a house is burglary; and if the excuse relied upon by the defendant be sufficient, he would be justified in knocking down the lintels of the door-way on the side of the house, if any of the articles he had seized were too large to be taken out at the entrance where he himself had got admission.

*Welsby* for the defendant. It is distinctly alleged in the special pleas to the declaration, and to the first new assignment, that the defendant *being lawfully in* that part of the house which was in the occupation of *Elizabeth Davis*, peaceably and quietly entered into the residue of the house through the door communicating between them, *it being open*, in order to take the goods in execution; and because the outer door of the house was fastened, and there was no one whom he could request to open it, therefore he broke it, in order to take the goods out in execution of the writ. It sufficiently appears on the face of these allegations taken together, that the outer door was not fastened by the defendant himself, or any person over whom he had a control. If it had been, that might have been new assigned. And as the defendant could not know by whom the door had in fact been fastened, he could not allege it in the plea. Then, it being assumed that the pleas are sufficient as to this point, they disclose a perfect defence. The defendant could not remain in the house for an indefinite period; and if it be said that he might have returned the way he came, yet he could not take the goods that way without committing a trespass. Besides, it appears that the door spoken of, was the only outer door of the whole house. In *Lee v. Gansel* (b), Lord *Mansfield* says, that this privilege of the

(a) 2 Roll. Rep. 137; Cro. Jac. 555; Palm. 52. (b) 1 Cowp. 1.

outer door, which is not a privilege of the debtor himself, but is annexed to the house and door for the protection of the inmates, is to be construed strictly, and not extended. The case which comes nearest to the present is that of *White v. Wiltshire* (a), which, though not precisely in point, shews that there may be circumstances of necessity or constraint which may justify the sheriff in breaking the outer door. There can be no distinction in principle between cases where the debtor himself locks the sheriff into the house, and where it is locked by some person over whom the sheriff has no control, and neither the plaintiff nor any other person on his behalf is there to open it. In *Buckenham v. Francis* (b), the plea was clearly bad, for not shewing that the outer door was open when the defendant entered. As to the illustration drawn from the law of burglary, that is rather in favour of the defendant's argument, since at common law breaking *into* a house only was burglary; and it is by an express statutable provision (7 & 8 Geo. 4, c. 29, s. 11), that breaking out, after the commission of a felony in the house, was made so.

1838.  
  
 PUGH  
 v.  
 GRIFFITH.

*Jervis* in reply. The plea in *White v. Wiltshire* (a) is an answer to the whole of the argument on the other side. If the defendant had locked the sheriff in, it is admitted he would have been justified in breaking out. As to his not being able to go out the way he came in without committing a trespass, that was his own fault, and his course was, either to wait till he had leave, or to take the risk upon himself of committing a trespass.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the pleadings, his lordship continued thus:—Upon this state of the pleadings it appears that the defendant, in his plea to the declaration, has justified the breaking and entering the house, and seizing the goods

(a) 2 Roll. Rep. 137; Cro. Jac. 555; Palm. 52. (b) 11 B. Moore, 40.

1838.  
PUGH  
v.  
GRIFFITH.

under a writ of fieri facias. He does not allege in the plea that the outer door was open, which is generally necessary, but he says that he was lawfully in a part of the house in the occupation of a lodger; and if the communication between the part of the house occupied by the lodger and the rest of the house should be in the nature of an outer door for the protection of the plaintiff's house, there is an averment in the plea, that the communication between the two was open, and therefore the entry into the part occupied by the plaintiff was authorized. The plaintiff in answer to this says, the matters justified in the plea are not what he complains of; and he says he brought his action not for that, but for breaking the outer door and entering the house on other occasions, and at other times, and in different parts of the house. The defendant's answer to this new assignment is, that in order to take the goods out of the house it was necessary to open the outer door; and, as neither the plaintiff nor any body on his behalf was there, so that a request could be made to them, he opened it. The plaintiff in answer says by another new assignment, that he did not bring his action for that, but for breaking the locks, bolts, staples, and hinges of the outer door. It is to be observed, that in the first new assignment the plaintiff says nothing about the locks, bolts, staples, and hinges, and as the plaintiff has in that new assignment confined his complaint to breaking the outer door, and breaking and entering the house, he cannot carry his second new assignment beyond the first new assignment. A question may at first appear to arise, whether this second new assignment is not bad altogether; but we think not, because, under the complaint of breaking the outer door, the plaintiff might give evidence of breaking the locks &c. fixed to and part of the door. Then the defendant, in answer to this, pleads as before stated. So that the general question, whether a sheriff, who has seized goods under a fieri facias, has a right to break an outer door to take them out of the house, when there is nobody whom he can request to open

the door, would not appear to arise; for the plaintiff, by his new second assignment abandons that complaint, and the only question on this record would now appear to be, whether the sheriff has a right to break the lock, bolt, and staple of the outer door to take out the goods. But though the plaintiff has abandoned the general complaint of breaking the outer door of the house, yet, under the objection he makes as to breaking the lock, bolt, and staple, he may contend that the sheriff had no right to break the outer door; and though he has abandoned the general breaking open the door, he has made no admission on the pleadings, as he might have been held to do if he had pleaded over in answer to the defendant's pleading; but here his pleading over is, that the defendant has not given any answer to what the plaintiff means to complain of, and that he has mistaken the nature of the plaintiff's complaint; and that it ought to be considered in the same light as if there was a *nolle prosequi* as to the whole of the trespasses, except breaking the lock, bolt, and staple of the outer door. As to that we think that he may stand in the same situation as if his declaration had been originally confined to the mere act of breaking the lock, bolt, and staple of an outer door of the house. It appears to us, that on the allegations on this record, which are not denied, the sheriff had a right to break open the outer door, and to break the lock, bolt, and staple affixed to it. The sheriff shews a lawful entry into the house, and a lawful seizure of the goods; and in his plea to the first new assignment he says, that he could not take the goods out of the house without opening the outer door; the particular door therefore is identified, so that it cannot be said there were any other doors, or any other mode of getting the goods out. Then, what was the sheriff to do? the goods could not be kept for ever in the house, and neither the plaintiff nor anybody else was there, so that he could request them to open the door, and there was nothing else to be done but to open it himself, and he says that he did no unnecessary damage;

1838.

PUGH  
v.  
GRIFFITH.

1838.  
  
 PUGH  
 v.  
 GRIFFITH.

and then as to the complaint of breaking the lock, bolt, and staple, that he could not open the outer door without breaking, damaging, and spoiling them; and as to that, also, he alleges the absence of the plaintiff and every other person to whom he could make a request, and therefore as to that also, which is now the only cause of complaint, he appears to be justified, as a matter of necessity, in order to get the goods out to execute the writ. It may be said that he locked the door himself, and if so, he could not justify the breaking the lock &c. to pieces; if he had done so, it might be further new assigned or replied in some way or other; but in pleading a justification we do not think it necessary to aver that the trespass complained of was not occasioned by his own default. The case of *White v. Wiltshire* (a) was trespass for breaking and entering plaintiff's house. Justification under a fieri facias; and that after entry to take the goods in execution, the plaintiff shut the door upon the bailiffs and imprisoned them; then the defendant broke open the doors, and broke the locks to rescue the bailiffs. The Court said, that though the sheriff cannot break open a house to make execution by a fieri facias, yet where the door is open, and he enters, and is disturbed in his execution by the parties who are within the house, he may break into the house to rescue his bailiffs, and to take execution. In that case the breaking into the house was justified, because the plaintiff himself had occasioned the necessity of it: but it does not follow that there may not be other occasions where the outer door may be broken. Several cases were cited as to the duties and powers of sheriffs, but they do not so nearly apply to the point raised on this record as to make it necessary to comment upon them. Some of them seem to require that a demand should be made by the sheriff in particular cases, but the necessity of a demand in the present case is obviated, because there was nobody on whom a demand could

(a) 2 Roll. Rep. 137; Cro. Jac. 555; Palm. 52.

be made. Upon the whole of the case we are of opinion that there should be judgment for the plaintiff.

1838.

POUGH  
v.

Judgment for the plaintiff.

GRIFFITH.

DOE d. CADOGAN v. EWART.

Thursday,  
May 31st.

THIS was an action of ejectment, brought to recover certain premises, situate in the several parishes of Orton and Burgh-by-Sands, in the county of Cumberland. The defendant pleaded the general issue, and issue having been joined thereon, the following case (in substance) was stated, by the consent of the parties, for the opinion of the Court.

*Richard Hodgson*, late of Moorhouse Hall, in the county of Cumberland, Esq., made and published his last will and testament in writing, bearing date 18th January, 1828, and thereby devised to *Jane Dalston Hodgson*, and her assigns, an annuity or rent charge of 200*l.* a year, to be issuing and payable out of all such messuages, lands, tenements, and real estate (except his estate at Fauld), as he might be pos-

Devise of freehold lands (before 7 Will. 4 and 1 Vict. c. 26, s. 29,) to trustees, and the survivors and survivor of them, and the heirs of such survivor (subject to an annuity to *J. D. H.* and her assigns, payable by such trustees; and also to so much of the devisor's just debts, legacies, &c.

as the residue of his personal estate should not extend unto), upon trust to receive the rents, issues, and profits, and pay them to the devisor's wife during her life, continuing his widow; and from and after her death or marriage, "upon trust to apply the said rents, issues, and profits towards the maintenance and support of my daughter *Isabella*, until she shall attain the age of 25 years; and from and after her attaining that age, then upon trust as to my real estate, subject and charged as aforesaid, for my said daughter *Isabella*, her heirs and assigns for ever. But in case it should happen that my said daughter *Isabella* depart this life without leaving issue lawfully begotten," then to *W. H.* and *J. D. H.*, their heirs and assigns for ever, as tenants in common. The devisor also gave a power to the trustees, in order to raise money for payment of debts &c., to sell in fee any part of the premises devised.

The devisor's wife died during his life-time.

The trustees sold part of the real estates for payment of the devisor's debts.

*Isabella*, after his death, suffered a recovery "in order to bar and extinguish all her estates tail in the said hereditaments." She afterwards died under 25, without leaving any issue of her body.

Held, 1. That *Isabella* took an equitable estate tail under this devise.

2. That the estate tail of *Isabella* was vested on the death of the devisor.

3. That the trustees took a legal fee simple in the whole of the lands comprised in the devise, for the purposes of their trusts: that the recovery suffered by *Isabella* was, therefore, an equitable recovery: and that the remainder dependant upon the estate tail, devised to *W. H.* and *J. D. H.*, being for the same reason an equitable remainder, was barred by the recovery.

1838.  
  
 DOE  
*d.*  
 CADOGAN  
 v.  
 EWART.

sessed of at the time of his decease, and to be paid by his trustees thereafter named. He also devised to his sister *Jane Hodgson*, the dwelling-house and garden, &c. then in her occupation at *Fauld*, in the parish of *Burgh-by-Sands*, during her natural life, for her own residence only. And the said testator devised unto *John Forster*, *William Hodgson Cadogan*, the lessor of the plaintiff (by his then name of *William Hodgson*), and *Joshua Anderson*, and the survivors and survivor of them, and the heirs of such survivor, all his messuages, lands, and tenements, situate at *Moorhouse*, *Orton*, and *Burgh*, in the said county of *Cumberland*, and all other his real estate whatsoever and wheresoever (subject to the life estate of his sister *Jane Hodgson*, in his real estate at *Fauld*, and charged with the said annuity or rent charge, and also with so much of his just debts, legacies, funeral expenses, and costs of his will, as the residue of his personal estate would not extend unto), upon the several trusts, and to and for the several uses, &c. following: that is to say, upon trust to receive the rents, issues, and profits thereof, and to pay and apply them from time to time unto the only proper use and behoof of his the said testator's wife, *Mary*, during her life, in case she should so long continue his widow: and from and after her death or re-marriage, "*upon trust to apply the said rents, issues, and profits towards the maintenance and support of my daughter Isabella, until she shall attain the age of 25 years; and from and after her attaining that age, then upon trust as to my real estate, subject and charged as aforesaid, for my said daughter Isabella, her heirs and assigns for ever; and I give and devise the same to her accordingly. But in case it should happen that my said daughter Isabella depart this life without leaving issue lawfully begotten, then I give and devise the said messuages, lands, tenements, and real estate, unto the said William Hodgson and the said Jane Dalston Hodgson, their heirs and assigns for ever, as tenants in common.*" There was also provision for the cesser of the annuity of 200*l.* to *Jane Dalston Hodgson*, in the event of her becom-

ing entitled to any part of the real property under the will : and a power of sale to the trustees, extending over all the hereditaments devised to them, for the payment of debts, funeral expenses, and legacies. The testator finally "committed the management of the estates and fortunes of his said daughter," to his said trustees and executors until she should attain the age of 25 : and he appointed his said trustees executors of his will.

*Mary Hodgson*, the wife of the testator, died in his lifetime. The testator died on the 21st May, 1833, without having revoked or altered his will, leaving his daughter, *Isabella*, his heiress at law. His personal estate not being sufficient for the payment of his debts, the trustees sold part of the real estate, including the premises devised to the testator's sister, *Jane Hodgson*, for her life.

By indentures of lease and release, bearing date respectively the 25th and 26th January, 1833, the release being made between the said *Isabella Hodgson*, who had then attained the age of 21 years, of the first part ; *William Higley*, gentleman, of the second part ; and *George Saul*, gentleman, of the third part ; *Isabella Hodgson* conveyed to *Higley* all the hereditaments devised to or in trust for her, her heirs and assigns, by her father (except such parts as had been sold by the trustees), to the end that he might be tenant to the præcipe for the purpose of suffering a recovery, in order to bar and extinguish all estates tail of *Isabella* in the said hereditaments ; and it was declared that the recovery should operate to the sole use of *Isabella Hodgson*, her heirs and assigns. In pursuance of this indenture, a common recovery was suffered in Hilary term 2 Will. 4.

By indentures of lease and release of the 9th and 10th August, 1833, the release being made between *Isabella Hodgson*, of the first part ; the defendant, *David Ewart*, of the second part ; *John Forster* and *Simon Ewart*, of the third part ; and the said *George Saul* and *Simon Saul*, of the fourth part ; in consideration of the marriage then intended and afterwards solemnized between *Isabella Hodgson*

1833.  
DOE  
d.  
CADOGAN  
v.  
EWART.

1838.  
 ~~~~~  
 DOE
 d.
 CADOGAN
 v.
 EWART.

and the defendant, *Isabella* conveyed the same hereditaments to *J. Foster* and *S. Ewart*, and their heirs, on trust, &c., and after the decease of *Isabella Hodgson* or the defendant, to the use of survivor for life, then to preserve contingent remainders, with remainder to the use of the children of the then intended marriage, as *Isabella* should by will appoint; in default of such appointment, in trust &c., and in default of issue, to the use of *Isabella Hodgson*, her heirs and assigns for ever.

By indenture, bearing date 9th November, 1833, and made between the defendant and *Isabella*, his then wife (late *Isabella H.*), of the first part, and *J. Forster* and *S. Ewart* of the second part, *Isabella* agreed to levy a fine to the uses declared in the settlement of the 10th August, anterior to the limitation to the use of *Isabella*, her heirs and assigns; and to assure the same hereditaments (subject as aforesaid) to such uses &c. as the said *Isabella Ewart*, by her last will and testament, should appoint, and in default of such appointment to the use of herself, her heirs and assigns. In pursuance of this agreement a fine was levied of the said hereditaments in Michaelmas term 3 Will. 4.

Isabella Ewart, by her will, bearing date 7th January, 1834, reciting the power given her by the indenture of 9th November and the fine, appointed all her hereditaments within the county of Cumberland, (subject to such, if any, of the uses and trusts anterior to the power of appointment so given to her, as under the said indenture of 9th November, 1833, and fine were then subsisting or should take effect), to the use of her husband, *David Ewart* (the defendant), his heirs and assigns for ever.

Isabella Ewart died in January, 1834, under the age of 25, without leaving any issue of her body, but leaving her husband, the defendant, her surviving.

The question for the opinion of the Court is, whether the lessor of the plaintiff is entitled to recover in this action a moiety, under the devise to him and the said *Jane Dalston Hodgson* (as tenants in common in fee simple), of such of

the hereditaments in the county of Cumberland, devised by the said will of the testator, *Richard Hodgson*, as were not sold by the trustees of his will. If the Court should be of that opinion, the defendant agrees that judgment should be entered against him by confession; and if the Court should be of opinion that the lessor of the plaintiff is not entitled to recover, the lessor of the plaintiff agrees that judgment of *nolle prosequi* shall be entered against him.

1838.

 DOE
d.
 CADOGAN
v.
 EWART.

Sir *W. W. Follett*, for the lessor of the plaintiff. There are several points involved in this case: 1. Whether the trustees took an estate of freehold in the devised hereditaments, until *Isabella* should attain the age of 25 years, with power to sell for the payment of debts and legacies: in which case the recovery suffered by *Isabella* was ineffectual to bar her estate tail, if she had one, in consequence of their not having joined to make a tenant to the writ of entry, unless that defect is cured by 3 & 4 *Will.* 4, c. 74, s. 11. 2. Whether by the words of the will, *Isabella* took an estate in fee simple, subject to an executory devise over to the lessor of the plaintiff and *Jane Dalston Hodgson*, in the event of her dying without issue under the age of 25, or an estate in fee tail. The latter point is of the greatest importance in the case; and in arguing it, it must be assumed, for the present, that the trustees only took a term. The words of the will are, "in case it should happen that my said daughter, *Isabella*, should depart this life *without leaving issue lawfully begotten*." If these words imply her death without leaving issue at the time of such death, she had an estate in fee simple, with an executory devise over on that event, and her recovery and fine were of no effect: if they imply an indefinite failure of issue, then she had an estate tail, and the defendant is entitled to judgment. A distinction has been long established between the meaning of the words "leaving no issue," in devises of real property and in bequests of personalty; namely, that in the former case it means an indefinite failure of issue; in the latter, it imports

1838.

 Doe
d.
 CADOGAN
v.
 EWART.

leaving no issue at the death of the legatee (*a*). That distinction was first laid down in *Forth v. Chapman* (*b*); but it may be worth while to remark, that Lord *Kenyon*, in *Porter v. Bradley* (*c*), questioned its soundness, and said, that if such a distinction existed in the law, it certainly would not agree with the rule “lex plus laudatur quando ratione probatur.” It is true that Lord *Kenyon* subsequently admitted the distinction, *Daintry v. Daintry* (*d*); and other cases have confirmed it. But the intention of the testator, as collected from the whole of the will, is in all cases to be considered as conveying a meaning to the peculiar words used; *Roe v. Jeffery* (*e*). It has been held in several cases that the words “dying without issue,” (which seem to point to an indefinite failure much more distinctly than the words “if she shall die without issue,”) may, when explained by the context, import failure at the death of the party named, and consequently that such a devise may give a fee simple with an executory devise over; *Pells v. Brown* (*f*); termed by Lord *Kenyon*, “the Magna Charta of this branch of the law.” Such is the case where the dying without issue has reference to some particular event; as for instance, the event of death within a given age; *Price v. Hunt* (*g*); *Eastman v. Baker* (*h*); *Glover v. Monckton* (*i*). Those cases apply expressly to that now under consideration, for the age of 25 is here specified as that, on attaining which, the devisee takes a vested interest. Supposing she had died under 25 leaving issue, would they have taken? or is it not the intention that the estate should not have gone over, unless on the happening of both the events specified; i. e. her dying both under 25 and without issue? If the latter is the construction, then the case is very like *Price v. Hunt* (*g*). Then as to the several intentions there can be no doubt.

(*a*) 2 Powell on Devises, by Jarman, p. 566.

(*b*) 1 P. Wms. 663.

(*c*) 3 T. R. 143.

(*d*) 6 T. R. 307.

(*e*) 7 T. R. 589.

(*f*) Cro. Jac. 590.

(*g*) Pollex. 645.

(*h*) 1 Taunt. 174.

(*i*) 3 Bing. 13.

All the provisions shew that the event contemplated by the testator was not an indefinite, but an immediate failure of issue : there is, first, a devise upon trust for the maintenance and support of *Isabella*, and in trust to convey to her on attaining the age of 25 ; if she had died under 25, leaving lawful issue, then in trust to apply for the benefit of such issue ; but if under 25, and leaving none, then the whole surplus absolutely to the lessor of the plaintiff and *J. D. H.* ; in order to effect that intention, this last limitation must be construed an executory devise.

Next, whether the trustees took an estate of freehold. It will be observed in the first place, that they took an estate in trust for the wife during her life : now the wife's intended interest was clearly freehold ; and although in point of fact she died before the testator, yet if she had survived, the trustees must of necessity have taken a freehold estate : and it cannot be said that the question, whether under this will they took such an interest or no, depends on the accidental circumstance of her dying or surviving. In ordinary cases there is no doubt that where the trustees, as in this instance, have to apply the rents and profits, they take the freehold estate ; and it must be shewn whether there is any thing in this will to vary that construction. It must be contended on the other side, that the trustees first took an estate of freehold during the life of the wife, and after her death a term of years, until the daughter attained 25. Then as to the effect of 3 & 4 *Will.* 4, c. 74, s. 11. Under that statute the concurrence of the trustees is only supplied in cases where they have the estate for the whole life of cestui qui trust ; here they took a fee simple determinable on the daughter's attaining the age of 25 ; therefore the statute does not apply.

Sir *F. Pollock*, for the defendant. It is sought on behalf of the lessor of the plaintiff, to overturn a construction of words which has been followed for more than a century. The points on behalf of the defendant are, 1. That *Isabella*

1838.

DOE
d.
CADOGAN
v.
EWART.

1838.

 DOE
 d.
 CADOGAN
 v.
 EWART.

took an estate tail: 2. That such estate was vested in her: 3. That whether the trustees took a chattel or a freehold interest, the defect in the recovery is cured by 3 & 4 Will. 4, c. 74, s. 11. And with regard to the intention: as the objects of the ultimate limitation in this instance were strangers in law (natural children of the testator), it cannot be contended that the words must be strained to imply a meaning consonant with an intention in their favour. As to the first point, *Forth v. Chapman* (a), *Pleydell v. Pleydell* (b), *Doe d. Ellis v. Ellis* (c), *Tenny d. Agar v. Agar* (d), *Dansey v. Griffiths* (e), are authorities to shew that the limitation over is not an executory devise. It is an established rule, that no person shall take by executory devise who can take by way of remainder; *Walter v. Drew* (f). 2. This was a vested estate; *Warter v. Hutchinson* (g), *Boraston's case* (h), *Driver v. Frank* (i). 3. Whether the trustees take chattel or freehold interest, depends on the purposes for which the trust was created; *Doe v. Simpson* (k). The wife having died before the testator, they would only take a term, which is all that was necessary for the fulfilment of the trust. But in either case the recovery was good. If a chattel, the trustees' estate for years would not interfere with *Isabella's* recovery. If a fee simple, it would still be a good equitable recovery.

Sir *W. W. Follett*, in reply. No doubt has been thrown on the cases of *Glover v. Monckton* (l), *Porter v. Bradley* (m), and *Roe v. Jeffery* (n), which are more like the present than those cited on the other side. In the case of *Doe d. Ellis v. Ellis* (c), Lord *Ellenborough* says, that dying without issue means an indefinite failure, and that it does not mean

(a) 1 P. Wms. 663.

(b) 1 P. Wms. 748.

(c) 9 East, 382.

(d) 12 East, 253.

(e) 4 M. & S. 61.

(f) 1 Com. Rep. 372.

(g) 1 B. & C. 721; S. C. 3 D.

& R. 58.

(h) 3 Rep. 19.

(i) 2 B. Moore, 519.

(k) 5 East, 163.

(l) 3 Bing. 13.

(m) 3 T. R. 143.

(n) 7 T. R. 589.

X dying *without leaving issue*; that is therefore an authority against the defendants. *Tenny v. Agar* (a) turned on the construction of the whole will. *Dansey v. Griffiths* (b) is also a case turning not on words but on circumstances. As to the estate vesting in *Isabella*: Admitting, for the purpose of argument, that she took a vested interest, then if she died under twenty-five she could not hold it; but if she did not take a vested interest, then the recovery was void altogether. [*Patteson J.* If she took no estate at all until she attained the age of twenty-five, there is a difficulty in saying how any estate could have gone to her issue, if she had died leaving any.]

1838.

 DOE
 d.
 CADOGAN
 v.
 EWART.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—This was an ejectment brought by the surviving trustee to uses under the will of *Richard Hodgson*, against the husband of another devisee under the same will, who had suffered a recovery and conveyed the premises to defendant. The will devised all the real and personal estate to the two trustees, upon trust to receive the rents &c., and to apply them (after the death of testator's wife, who died before him) "to the maintenance and support of my daughter *Isabella*, until she shall attain the age of twenty-five; after which, for my said daughter *Isabella*, her heirs and assigns, for ever, and I give and devise the same to her accordingly. But in case it should happen that my said daughter depart this life without leaving issue lawfully begotten, then I give and devise the same to the said trustees, their heirs and assigns, for ever, as tenants in common." And the testator ordained that his said trustees for the performance of his said will, and in order to raise money for payment of his debts, funeral expenses, and legacies, should, if his personal estate was found insufficient, sell in fee any part of the premises devised. After attaining twenty-one, *Isabella Hodgson*, on the 25th January, 1832, suffered a recovery to the use of herself

(a) 12 East, 253.

(b) 4 M. & S. 61.

1838.
 Doe
d.
 CADOGAN
v.
 EWART.

in fee; and afterwards, 9th November, 1833, in consideration of the intended marriage, conveyed to the use of herself for life, remainder to defendant for life, to such uses as she should appoint (remainder to the children, but there were no children of the marriage), remainder to herself in fee. And after levying a fine to the same uses, she died under the age of twenty-five.

It was contended for the defendant, that the trustees either took the legal fee, and *Isabella* was equitable tenant in tail, or that they took a chattel interest for so long only as she continued to be under twenty-five, or that if they took a freehold, their defect of joining in making a tenant to the præcipe was cured by 3 & 4 Will. 4, c. 74, s. 11.

For plaintiff, that the trustees took only an estate of freehold, determinable on *Isabella* attaining twenty-five, or first dying, or that she took in fee with an executory devise over.

There are two principal questions in this case: first, Whether *Isabella Hodgson*, the daughter of the testator, took an estate in fee, with an executory devise over to Major *William Hodgson* and *Jane Dalston Hodgson*, or whether she took a vested estate tail, with remainder over to the same persons. If she took an estate in fee with an executory devise over, then the plaintiff, who is now called *Cadogan*, but in the will called *Hodgson*, who is one of the persons named in the devise over, is entitled to recover, because the recovery suffered by *Isabella Hodgson* could not bar the executory devise over. But if *Isabella Hodgson* took a vested estate tail, with remainder over, then the second question will arise: Whether the recovery suffered by her be a valid recovery, sufficient to bar the remainder over.

On the first question, the words of the will, which give the estate to "the testator's daughter, *Isabella Hodgson*, her heirs and assigns, for ever," *prima facie* import a devise in fee simple, and then the words which follow, "but in case it should happen that my said daughter-*Isabella* depart this life without leaving issue lawfully begotten, then I give the said messuage, lands, tenements and real estate, unto the said Major *William Hodgson* and the said *Jane Dalston*

Hodgson, their heirs and assigns, for ever," as "tenants in common," would, according to the common and ordinary idiom and construction of the English language, independent of any technical rules which have been applied to the construction of legal instruments, imply that the devise over was to take place in the event of *Isabella* dying without issue, which should be living at the time of her death.

But the law has prescribed certain limits for the validity of executory devises, and one of them is, that the contingency upon which an estate of this sort is permitted to take effect, shall happen within a short space of time, as a life or lives in being and some few years, now settled at twenty-one years and the period of gestation, otherwise it would be in a testator's power to limit an estate unalienable for generations to come; a power which the law denies. And therefore where an executory devise is limited to take effect after an indefinite failure of issue, the limitation over is void.

Under this rule, if the limitation be to take effect after a dying without heirs or without issue generally, that is considered to be an indefinite failure of issue, and therefore void. And the same rule holds in the limitation of a term or other personal estate, that a disposition to take effect after failure of the heirs of the body, or dying without issue generally, without other restriction, is too remote, for the law will no more admit of a perpetuity in one sort of estate or species of property than in another.

But with regard to executory devises of terms for years, or other personal estates, the Courts have for a very considerable time very much inclined to lay hold of any words in the will to tie up the generality of the expression "dying without issue," and confine it to "dying without issue living at the time of the person's decease." There is a great variety of cases, not necessary to be referred to, illustrating this position, and we may say, without any doubt, that the words of the present will would, if the question arose upon a term for years or other personal estate, now be held to

1838.

DOE
d.
CADOGAN
v.
EWART.

1838.
 }
 DOR
 d.
 CADOGAN
 v.
 EWART.

mean "a dying without issue living at the death of the daughter *Isabella*."

But though the Courts, in the case of personal estates, generally incline to pay attention to any circumstance, or expression in the will, that seems to afford a ground for construing a limitation, after dying without issue, to be a dying without issue living at the death of the party, in order to support the devise over, yet in the case of real estate it seems the construction is generally otherwise, and the reason given is, that the interest of the heir is concerned, who is said to be always favoured in our law.

In *Target v. Gaunt (a)*, the expression "dying without issue" is recognized as having two senses: 1st, a vulgar sense, and that is, dying without leaving issue at the time of the death; 2d, a legal sense, and that is, whenever there is a failure of issue. And that there is a great diversity betwixt the devise of a freehold estate for life, and if *A.* dies without issue, then to *B.*, and a devise of a term in the same words.

The case of *Forth v. Chapman (b)* establishes this distinction. There the testator gave the residue of his real and personal estate to two nephews, *William G.* and *Walter G.*, and if either of them should depart this life and leave no issue of their respective bodies, then he gave the said (leasehold) premises to other persons, upon which the question arose, whether the limitation over of the leasehold premises was void as too remote.

The Master of the Rolls, Sir *Joseph Jekyll*, was of opinion that the devise over was void, and said, that if the words had been "if *A.* or *B.* should die without issue, with remainder over," this plainly would have been void, and exactly like the case of *Love v. Windham (c)*. And then he goes on to say there is no diversity betwixt the devise of a term to one for life; and if he die without issue remainder

(a) 1 P. Wms. 432; 1 Eq. Ca. Abridged, 193, pl. 11; Gilbert's Eq. Reports, 149; 10 Mod. 402.

(b) 1 P. Wms. 663.

(c) 1 Sid. 450; 1 Vent. 79; 1 Mod. 50.

over, and a devise thereof to one for life with such remainder, if he die leaving no issue, for both these devises seem equally relative to the failure of issue at any time after the testator's death.

Afterwards, in Trinity term, 1720, this case coming on before Lord *Parker*, on an appeal, his lordship reversed the decree, and said, that "if I devise a term to *A.*, and if *A.* die without leaving issue remainder over, in the vulgar and natural sense this must be intended 'if *A.* die without leaving issue at his death,' and then the devise over is good: that the word *die* being the last antecedent, the words 'without leaving issue' must refer to that." Lord *Parker* also observed, that by this will the devise was of a freehold as well as a leasehold estate to *William Gore*, and if he or *Walter* died leaving no issue, then to the children of his brother and sister; in which case it was more difficult to conceive how the same words, in the same will, at the same time, should be taken in two different senses. As to the freehold the construction should be, if *William* or *Walter* died without issue generally, by which there might be at any time a failure of issue; and with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue at their death. However, the Lord Chancellor said it might be reasonable enough to take the same words as to the different estates in different senses, and as if repeated by two several clauses.

Mr. *Peere Williams*, in a note on this case, says, that by the will, as it is stated above, from the registrar's books, in the statement of the case at the Rolls and on the appeal, the limitation over was expressly restrained to the *leasehold*; but in Lord *Macclesfield's* notes that word is omitted, and the devise over is general; but in *Sheffield v. Lord Orrery* (a), Lord *Hardwicke* says that "Mr. *Williams* is mistaken in this note, for on looking into this case, it appears that both freehold and leasehold were devised by the same words, but

1838.

DOE
d.

CADOGAN

v.

EWART.

(a) 3 Atk. 288.

1838.

 DOE
d.
 CADOGAN
v.
 EWART.

probably the limitation of the real was overlooked, and so omitted by the register.

The words in that case are in effect the same as in the present, the words there being "if the nephews should die and leave no issue of their respective bodies," and in the present case, "if it should happen that my daughter depart this life without leaving issue lawfully begotten." It will be to be considered how far the case of *Forth v. Chapman* (a) has been recognized or impugned in other cases.

In *Sheffield v. Lord Orrery* (b), before cited, Lord Hardwicke recognizes the doctrine of Lord Macclesfield in *Forth v. Chapman* (a), that the same words may have different constructions to effectuate the intention of the party.

In *Walter v. Drew* (c), where the will was, that if *W. W.*, the son of the testator, should happen to die and leave no issue of his body lawfully begotten, that then after the death of *W.* he gave and bequeathed all his lands of inheritance to his son *Richard* and his heirs, it was held that *William* took an estate tail by implication, which was barred by the recovery; and that the limitation over was a remainder, and not an executory devise. The authority of that case is also confirmed by Lord Hardwicke, in *Southby v. Stonehouse* (d), where, in page 616, he says, "The only objection to this construction is, that this will not construe the words according to her expression in the former clause, but puts a different construction upon the same words, in two different events. Now that that may be done there are authorities; and in a much stronger case, viz. *Forth v. Chapman* (a): where the greatest difficulty in the way of Lord Macclesfield was, that the freehold and the leasehold were devised by the same words, and yet he held those words were to receive a construction according to the subject-matter," and he again repeats what he had done in *Sheffield v. Lord Orrery* (b), that there was a mistake in Mr. Williams's note, as to the limitation in *Forth v.*

(a) 1 P. Wms. 663.

(b) 3 Atk. 288.

(c) 1 Com. Rep. 372.

(d) 2 Ves. sen. 610.

Chapman (a), for that he, Lord *Hardwicke*, was the counsel in the cause.

In *Denn d. Geering v. Shenton* (b), the devise was to *Samuel Shenton* and the heirs of his body, and their heirs and assigns, chargeable with the payment of 8*l.* a year. "But in case the said *Shenton* should die without *leaving* issue of his body, then I give the said devised premises to *William G.* and his heirs for ever." Lord *Mansfield* asked Mr. *Cowper* "if he had any case to shew, where, upon a limitation of lands upon a dying without issue, these words had been confined to a dying without issue living at the time of the death. The distinction is, between a devise of lands and personal estate; in the latter case the words are taken in the vulgar sense, that is, dying without issue living at the time of his death; in the former they are taken in their legal sense, and that is, whenever there is a failure of issue." Lord *Mansfield* said "the question is, whether the grandson took an estate in tail or an estate in fee. Now the devise is to *Samuel Shenton*, and the heirs of his body, and their heirs for ever; but the words "their heirs for ever" are qualified by the subsequent words, "in case he shall die without leaving issue," which clearly shew it to be an estate tail; and then the testator gives it over to the lessors of the plaintiff," and he adds, it is too clear to admit of a doubt. There the words were without *leaving* issue. In *Goodtitle d. Peake v. Pegden* (c), which was the demise of a chattel interest, Lord *Kenyon* relies upon the case of *Forth v. Chapman* (a), without any objection.

In the case of *Daintry v. Daintry and another* (d), Lord *Kenyon* recognizes the case of *Forth v. Chapman* (a). In *Tenny d. Agar v. Agar* (e), the devise was to the devisor's son, *John Agar*, and his right heirs for ever, on condition of paying certain sums to his daughter. "And in case my said son and daughter both happen to die without leaving

1838.

DOE
d.
CADOGAN
v.
EWART.

(a) 1 P. Wms. 663.

(d) 6 T. R. 307.

(b) 1 Cowp. 410.

(e) 12 East, 253.

(c) 2 T. R. 720.

1838.

 DOE
 d.
 CADOGAN
 v.
 EWART.

any child or issue," then he devised the reversion and inheritance to his cousin *Richard*, and his right heirs for ever. *John Agar* suffered a recovery, and the question was, whether he took an estate tail, or whether there was a valid executory devise to *Richard*. The Court held, that *John Agar*, the son, took an estate tail, which was well barred by the recovery; and Mr. Justice *Le Blanc* said, there was no case where the words "die without leaving issue" simply, have been adjudged to mean "without leaving issue at the time of his death;" and he added, "in *Porter v. Bradley* (a), there were also the words "behind him." In *Dansey v. Griffiths* (b), *Richard Dansey* devised the estates to his eldest son, *Dansey Richard Dansey*, and his heirs for ever. "But if it should so happen that his eldest son should die and leave no issue," then he devised his estate to his son *W. Dansey* and his heirs, and if he should die without issue, then to his son *E. C. Dansey*, and in the like case to his son *G. W. D.*, and in the like case to his son *J. D.*; and in failure of issue from him, to the eldest son of his surviving sister *Mary*, and his heirs. The testator died, leaving his eldest son surviving him, and the question sent by the Master of the Rolls was, what estate the eldest son took. And the Court certified their opinion that the eldest son, *D. R. Dansey*, took an estate tail under the will. There is also the case of *Doe d. Ellis v. Ellis* (c). The testator devised to his eldest son *Joseph*, his heirs and assigns for ever, the estate in question; but in case his son *Joseph* should die without issue, he devised the same to the child or children with which his wife was enceinte, his or her heirs and assigns for ever; and it was held that *Joseph* took an estate tail. And also the case of *Brice v. Smith* (d), which was referred to by Lord *Ellenborough* in *Doe d. Ellis v. Ellis* (c). There the testator devised the premises to his son *Phillip* and his heirs for ever, and other estates to other sons and their heirs, and then he adds, "in case any of my

(a) 3 T. R. 143.

(b) 4 M. & S. 61.

(c) 9 East, 382.

(d) Willes, 1.

said children shall die without issue, then I give the estate of him or them dying to his or their heirs for ever." Held an estate tail. Also *Roe v. Scott*, in Mr. *Fearne's* Manuscripts, and which is published in the notes, 474, of *Butler's* edition, 1809. There the testator devised certain lands to his son *James* and his heirs and assigns for ever, and other lands to his son *John* and his heirs and assigns for ever, and other lands to his son *Thomas* and his heirs and assigns for ever; and if either of his sons should depart this life without issue of him so dying, then to the survivor; and if they should all die without issue, then to his daughters and their heirs and assigns for ever. Held an estate tail in *Thomas*. But none of those three last cases have the words "*leaving issue*;" and it is beyond all doubt, that if a man devised in such a manner as in these three cases, the words *if he die without issue*, in legal construction mean an indefinite failure of issue; and the same words also, without more words, even in personal estates, import an indefinite failure of issue. In opposition to these cases are *Porter v. Bradley* (a) and *Roe d. Sheers v. Jeffery* (b), both decided in this Court, while Lord *Kenyon* was chief justice, and which are particularly entitled to attention, from the very great knowledge which that learned lord possessed upon all matters relating to real property. In the case of *Porter v. Bradley* (a), the testator devised to his son, *Philip Dobin*, his heirs and assigns for ever, all that messuage &c.; "but my will is, that in case my son, *Philip Dobin*, shall happen to die, *leaving no issue behind him*, then that my wife shall receive the rents and profits during her widowhood, and after her decease, I give and devise the same, for want of issue as aforesaid, to my son *James Dobin*, his heirs and assigns for ever: but in case my son *James Dobin* shall happen to die before my son *Philip*, and the said *Philip* shall not leave any issue of his body begotten, then my will is, that my said lands shall be sold, and equally divided between my six

1838.



DOE

d.

CADOGAN

v.

EWART.

X

(a) 3 T. R. 143.

(b) 7 T. R. 589.

1838.

DOE
d.
CADOGAN
v.
EWART.

daughters and their issue." One question was, what estate *Philip Dobin* took under the will of his father. Lord *Kenyon*, after stating the words of the devise, says, "The first question that arises in this case is, whether this is an estate tail or in fee. The first part of the devise to *Philip Dobin* *prima facie* carries a fee, for it is to him and his heirs and assigns for ever; but it is clear that those words may be restrained by subsequent ones, so as to carry an estate tail; and a long string of cases may be cited, in order to shew that, where an estate is limited to a man and his heirs for ever, and if he die without leaving heirs, then to his brother, or to any person who may be his heir, those words shall be restrained to heirs of a particular kind, namely, '*heirs of the body*.' If the subsequent part of this devise had been 'and in case he shall die without heirs, then over,' it would have given to *P. Dobin* an estate tail, which he might have barred by the recovery. But here the words are, 'but in case he shall happen to die leaving no issue behind him,' which makes a very material difference, and brings it within the case of *Pells v. Brown* (a), which is the foundation, and, as it were, the Magna Charta of this branch of the law. This question arose soon after executory devises were first taken notice of, which was in the reign of Queen *Elizabeth*, and that doctrine has never been since doubted by the Courts of Law. But the defendant's counsel has attempted to distinguish this case from that of *Pells v. Brown* (a), because there the words are, 'if *Thomas* (the first devisee) died without issue, living *William*, his brother;' but it is to be observed, that there are words in this case (*Porter v. Bradley* (b)) equivalent to those, namely, 'if *P. Dobin* shall die leaving no issue *behind him*.' If, indeed, only the first words, *leaving no issue*, had been used, they, according to the opinion of Lord *Macclesfield*, in *Forth v. Chapman* (c), must be restrained to mean 'leaving issue at the time of his death.' But it is contended that rule is confined to chattel

(a) Crn. Jac. 590.

(c) 1 P. Wms. 663.

(b) 3 T. R. 143.

interests only; yet it would be very strange if those words had a different meaning, when applied to real and personal property. If such a distinction existed in the law, it certainly would not agree with the rule, *lex plus laudatur quando ratione probatur*; but it is not founded in law; and there are even additional words in this case, 'leaving issue behind him,' which necessarily import that the testator meant at the time of his son's death. The subsequent parts of the will also convey the same idea;" and then he states the other parts of the will. The Court of King's Bench certified to the Court of Chancery, that *P. Dobin* took an estate in fee-simple, in the premises above devised to him; but as *Philip* died without issue living at the time of his death, they were of opinion that the further disposition made by the testator in that event, was good by way of executory devise. In *Roe d. Sheers v. Jeffery (a)*, the testator devised the premises in question to his wife for life, after her decease to his daughter for life, after her death to his grandson and his heirs for ever; "but in case his grandson should depart this life and leave no issue, then that the premises should be and remain unto the three daughters of *W. M. Friswell*, or the survivor or survivors of them, to be equally divided betwixt them, share and share alike." The question was, whether the grandson took an estate tail, or an estate in fee, with an executory devise over. Lord *Kenyon* made the same remarks as in *Porter v. Bradley (b)*, that it was not reconcilable with reason, that the same words should receive one construction as applied to one species of property, and another as to another; but he added that, if it had become a settled rule of property, it might be dangerous to overturn it. The case stood over, and Lord *Kenyon*, in giving the judgment of the Court, said that, on looking through the whole of the will, the Court had no doubt but the testator meant that the dying without issue was confined to a failure of issue at the death of the

1838.

DOE
d.
CADOGAN
v.
EWART.

(a) 7 T. R. 589.

(b) 3 T. R. 143.

1838.

 DOE
 d.
 CADOGAN
 v.
 EWART.

first taker; for the persons to whom it was given over were then in existence, and life estates only were given to them, and thus there was no doubt about the testator's intention; and it was held that the devise over was a good executory devise. In *Doe d. Barnfield v. Wetton (a)*, the testator devised the premises in question to his wife for her life, and after her death his freehold and leasehold premises to *Thomas Barnfield*, his heirs, executors and administrators, upon trust to permit his son *John* to take the rents and profits for his life, and after his death, upon trust for all the sons and daughters of his son *John*, and their heirs; and after the death of his wife, he devised his copyhold premises to his daughter *Susannah*, her heirs and assigns for ever; "but if his daughter should happen to die leaving no child or children, lawful issue of her body, living at the time of her death," then he devised the premises to *Francis Barnfield* and his heirs, upon trust, &c. It was held to be an executory devise, and it seems quite clear it must be so, because the dying without issue was limited to the life of *Susannah* the daughter, and therefore fell within the case of *Pells v. Brown (b)*, and other similar cases. In the case of *Crooke v. De Vandes (c)*, Lord *Eldon* thus expresses himself, p. 203, "When I read the case of *Porter v. Bradley (d)*, speaking with all due deference to the learned judge who expressed that dictum, it appeared to me that it went to shake settled rules to their foundation. I had heard the case of *Forth v. Chapman (e)* cited for years, and repeatedly by Lord *Kenyon* himself, as not to be shaken; and if *Porter v. Bradley (d)* has not since been disturbed in the Court of King's Bench, upon the principles expressed by Lord *Alvanley*, in *Campbell v. Campbell (f)*, against shaking settled rules, I will not add to the authority of that decision." In *Elton v. Eason (g)*, Sir *William Grant*, the Master of

(a) 2 B. & P. 324.

(b) Cro. Jac. 590.

(c) 9 Ves. 197.

(d) 3 T. R. 143.

(e) 1 P. Wms. 668.

(f) 4 Bro. C. C. 15.

(g) 19 Ves. 73.

the Rolls, thus begins his judgment—"There is no reason why the same words may not be differently construed, when they apply to different descriptions of property, governed by different rules." And in another part he says, "The case of *Crooke v. De Vandes* (a), in which the Lord Chancellor expresses his opinion very strongly in favour of the distinction in *Forth v. Chapman* (b), (and Lord Hardwicke has repeatedly recognized it), appears to be just as strong as this." After these remarks of Lord Eldon and Sir William Grant, we cannot consider the case of *Porter v. Bradley* (c) to have overturned the case of *Forth v. Chapman* (b), and the more so as since that case there have been the two cases of *Tenny d. Agar v. Agar* (d) and *Dansey v. Griffiths* (e) in this Court (above cited), directly the other way; and if the case of *Porter v. Bradley* (c) be supportable at all, it can only be on the ground of the words *behind him* being introduced after the words "leaving no issue," and which distinction is observed upon by Mr. Justice Le Blanc, in his judgment in *Tenny d. Agar v. Agar* (d); and with regard to *Roe d. Sheers v. Jeffery* (f), that case, if supportable at all, can only be so on the ground of the devise over being of life estates. In *Baron v. Salter* (g), Sir W. Grant says, "In *Roe v. Jeffery* (f) the devise over was only of life estates, and on that account Lord Kenyon compared it to *Pells v. Brown* (h)." We have made these remarks as applicable to the words of the will, as we do not think that there are any parts of it, which shew any intention to be inferred different from what the words import in their general legal signification. And upon the whole we come to the conclusion, that, as the case originally stood, the daughter *Isabella* took an estate tail. If indeed the words of the will had been "but in case it should happen that my said daughter *Isabella* depart this life *before she shall attain the*

1838.

DOE
d.
CADOGAN
v.
EWART.

(a) 9 Ves. 197.

(b) 1 P. Wms. 663.

(c) 3 T. R. 143.

(d) 12 East, 253.

(e) 4 M. & S. 61.

(f) 7 T. R. 589.

(g) 17 Ves. 483.

(h) Cro. Jac. 590.

1838.
 ~~~~~  
 DOR  
 d.  
 CADOGAN  
 v.  
 EWART.

*age of twenty-five years, and without leaving issue lawfully begotten,"* the addition of the words "*before she shall attain the age of twenty-five years and,*" might have varied the case, and it might be contended that these words would make it a dying without leaving issue living at the time of the death, before twenty-five. However, there are not any similar words in the will, and the former part of the will does not import them, for though *Isabella* is not to enter into the receipt of the rents and profits till she attained the age of twenty-five years, yet the devise over is not to depend at all upon her dying under that age, but on her leaving issue; and it is not necessary to consider the cases referred to in the argument on that point. When the age to which a person is to attain, and the dying without issue, are to form the basis of the devise over, sometimes the word *and* is mentioned, and at other times the word *or*, and the reasoning is formed upon those words. But here is the total absence of one of the branches.

So far we have commented upon the will as originally set out in the case. But the Court, when this case was first begun to be argued, directed the whole will to be introduced into and form part of the case. And by the will as fully set out, after bequeathing his household furniture, &c. to his wife, he gives the residue of his personal estate to his trustees in trust to apply it in payment of his debts, and then to invest the surplus in securities at interest, and to pay the interest to his wife for her life or during widowhood; and afterwards to apply it, or a sufficient portion of it, to the maintenance and support of his daughter *until* she shall attain the age of twenty-five years, and when she shall attain that age then to pay the principal and unapplied interest to her; but in case his said daughter should happen to die before having attained twenty-five years of age leaving lawful issue, then in trust to pay the same to such issue, share and share alike if more than one, as soon as they should respectively attain their ages of twenty-one years, and to pay the interest towards their

maintenance, education, and support in the meantime : but in case his said daughter should happen to die under that age and without leaving lawful issue, then he gave and bequeathed the whole of such surplus of his personal estate and effects unto the said Major *Wm. Hodgson* and his natural daughter *Jane Dalston Hodgson*, in equal shares, share and share alike. It will be seen by this, that the testator makes a provision as to his daughter dying under twenty-five years of age, and without leaving issue, which shews that he knew what would be the effect of those words ; and therefore from his silence when he comes to the limitation of the real estate, where no such words, or any words of similar import, are introduced, it seems to follow that he did not mean that they should be taken into consideration, and that the words must speak for themselves according to their general legal import ; and therefore the objection to the same words being construed in two different senses as to real and personal estate, does not apply to the present will. It has been argued in one of the former cases (*Dansey v. Griffith* (a)), that in *Forth v. Chapman* (b), and most of the other cases cited as to this point, where the subsequent words, on which the remainder over was limited, were held to give an estate tail to the first taker, that the estate was limited to the first taker indefinitely, and not by words of inheritance. But notwithstanding this, the Court held in that case, that the first taker had an estate tail ; and in several of the cases above cited there were words of inheritance in the estate of the first taker, and the Courts have never gone upon any distinction of that sort. And upon the whole we come to the conclusion, that the daughter *Isabella* took an estate tail. Then assuming that *Isabella* took an estate tail, another question is, whether the estate tail be vested in her before she attains the age of twenty-five years. In *Boraston's* case (c), the testator devised to *Thomas Amery* and his wife the premises in question for eight years, and after

1838.

DOE  
d.  
CADOGAN  
v.  
EWART.

(a) 4 M. &amp; S. 61.

(c) 3 Rep. 19.

(b) 1 P. Wms. 663.

1838.  
  
 DOE  
 d.  
 CADOGAN  
 v.  
 EWART.

the said term to remain to his executors until his son *Hugh Boraston* should attain his age of twenty-one years, and the mesne profits "to be employed by my executors towards the performance of my will; and when the said *Hugh* should attain the age of twenty-one years, then I will that he shall enjoy the premises to him and his heirs for ever." *Hugh Boraston* died at the age of nine years. The Court said, "the case at bar was no other in effect but that a man devises his lands to his executors [for the payment of his debts] until his son shall have come to his full age of twenty-one years, remainder to his son in fee; for although these are adverbs of time, 'when &c.' and 'then &c.,' yet they do not amount to make any thing precede the settling the remainder, no more than in the common case." In *Mansfield v. Dugard*(a) the testator devised to his wife till his son should attain the age of twenty-one years, and when his son should attain the age of twenty-one years, then to his son and his heirs; his son died at the age of thirteen years, and it was held, that the wife's estate determined at his decease, and that the remainder vested in the son upon the testator's death, and did not expect the contingency of his attaining twenty-one years. In *Goodtitle d. Hayward v. Whitby*(b), the testator devised the premises in question to trustees and their heirs in trust to lay out the rents and profits for the maintenance of his nephews during their minority, and when and as they should attain their ages of twenty-one years to remain to them and their heirs; it was held that the nephews took the fee immediately. In *Denn d. Satterthwaite v. Satterthwaite*(c), *Clement Satterthwaite* devised the premises to *William Satterthwaite*, his fourth son, for the use of *William Satterthwaite*, the son of the said *William*, for his maintenance and education till he attained the age of twenty-one years; after which he devised the same to *William Satterthwaite*, the grandson, and his heirs. The Court was clear that *William*, the father, was only in the nature of a guardian to *William*, his son, and that the fee-simple vested instantly in

(a) 1 Eq. Ca. Abr. 195.

(c) 1 W. Black. 519.

(b) 1 Burr. 228.

*William*, the son. In *Doe d. Wheedon v. Lea* (a), the testator devised the premises to *Thomas Lea* and *Edward Johnstone*, their heirs and assigns, to hold to them and their heirs until *Michael Lea*, then an infant of thirteen years of age, should attain the age of twenty-one years, on condition that they should, out of the rents and profits, during all that time keep the buildings in repair. Also he devised to the said *Michael Lea*, his heirs and assigns for ever, when and so soon as he should attain his age of twenty-four years, the premises in question, and directed the trustees to surrender the premises accordingly. *Michael Lea* attained the age of twenty-one years, but died under the age of twenty-four years. Lord *Kenyon* said, "the only question is, whether in the event of *Michael Lea* dying before he attained the age of twenty-four years, this was a vested interest in him descendible to his heir at law: and I conceive there can be no doubt on this question. It has been argued that it depended on a condition precedent, and that, that not having happened, the estate never vested in *Michael Lea*. And certainly the consequence contended for would follow, if this were a condition precedent. The only case cited in support of it is that of *Brownwood v. Edwards* (b); but it must be remembered the words there are very different from the present. There it was if he should attain the age of twenty-one years; but the words in this case only denote the time when the beneficial interest was to arise." The other two judges in Court, Mr. Justice *Ashhurst* and Mr. Justice *Grose*, gave their opinion to the same effect. There is also on this point the case of *Doe d. Morris v. Underdown* (c). We think these cases quite sufficient to shew that the estate tail of *Isabella* was vested on the death of the testator, her mother having died in his life-time. We may here observe, that this question as to the effect of dying without issue may perhaps be now agitated for the last time; for by the act 7 Will. 4 and 1 Victoria, c. 26, s. 29, which takes effect at the beginning of this year, all these expressions of

1838.

DOE  
d.  
CADOGAN  
v.  
EWART.

(a) 3 T. R. 41.

(c) Willes, 293.

(b) 2 Ves. 243.

1838.

DOE  
d.  
CADOGAN  
v.  
EWART.

"die without issue," or "die without leaving issue," or any other words which may import a failure of issue, shall be construed to mean a want or failure of issue in the lifetime of the party, and therefore the fifty-seven cases alluded to by Lord *Ellenborough*, in *Doe v. Ellis* (a), as having been mentioned by Lord *Thurlow* in *Biggs v. Beasley* (b), as having occurred on this head, as well as several others since that time, may be considered as out of our reports, except as to wills made before the present year.

The second question is, assuming *Isabellu* to have a vested estate tail, whether the recovery suffered by her was sufficient to bar the estate tail; and for that it is necessary to consider what estate the trustees took under the will. This Court had occasion a short time ago to consider the question, what estate trustees took under a will in the case of *Doe d. Shelley v. Edlin* (c), in which the rule laid down by Mr. Justice *Bayley* and Mr. Justice *Holroyd*, in *Player v. Nicholls* (d), was cited, where Mr. Justice *Bayley* says "that it may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and, therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it;" and Mr. Justice *Holroyd*, in the same case, says "that a trust estate is not to continue beyond the period required for the purposes of the trust." But the Court goes on to say that, "if the rules above mentioned, as laid down by these judges, be confined so as to say that the trustees originally take only that quantity of interest which the purposes of the trust require, as far as is expressed by the words used in the instrument itself, or by the apparent intention of the maker of the instrument, consistent with the language of it, then we admit the rule to be correct; but if it be meant to apply to all cases in general where the trusts are no longer capable of being carried into effect, but yet the instrument, by the legal construction of it, already gave an estate which might

(a) 9 East, 382.

(b) 1 Bro. Ch. Cases, 190.

(c) 4 A. &amp; E. 582.

(d) 1 B. &amp; C. 336.

continue for a longer period than that during which the objects of the trusts had an actual existence, then that, in my mind, will admit of a different consideration. I admit that for a great number of years past the Courts have held that trustees take that quantity of interest which the purposes of the trust require: and the question is, not whether the maker of the instrument has used words of limitation, or expressions adequate to convey an estate of inheritance, but whether the exigencies of the trust require a fee or can be satisfied by a less estate."

We acquiesce in what the Court there said, and we will now consider what estate the trustees took under the will, as qualified by the rule laid down in that case. The first thing to notice is the interest they took before *Isabella* attained her age of twenty-five years. That was only an estate for years, determinable upon her attaining that age or dying before; and that was not a freehold but a term of years, and it would not prevent *Isabella* from suffering a recovery, as she had the first immediate estate of freehold, and as the devise to her gave her the legal estate. As far as the mere devise to her went, that would be a legal recovery. Another trust imposed upon the trustees by the will is, to pay the rents and profits of the estate to the wife of the testator for her life or during her widowhood. That would give them a freehold interest in the estate; but as she died in the lifetime of the testator it never took effect, and as the duration of their estate for that purpose is limited by the will, it would fall within the general rule, that the object ceasing, the estate of the trustees ceases also. We do not enter into any consideration whether the words in the will would give the legal estate to the trustees; if they did not the wife of the testator would have had the legal estate, but the estate being gone altogether it is no objection to the recovery.

The next thing is the annuity to *Jane Dalston Hodgson*. If an annuity be left charged upon the real estate, and the estate be devised to trustees, that alone does not give the legal estate to the trustees; but if they are directed to pay

1838.  
  
 Doe  
 d.  
 CADOGAN  
 v.  
 EWART.

1838.  
 }  
 DOR  
 d.  
 CADOGAN  
 v.  
 EWART.

the annuity, then they have the legal estate for that purpose. This is fully illustrated by Lord *Alvanley* in *Kerrick v. Lord William Beauclerk* (a). As to payment, debts and annuities stand upon the same footing. And then inasmuch as the will directs the trustees to pay the annuity, there appears to be an estate of freehold in the trustees which precedes the estate of *Isabella*, the daughter, and consequently would prevent her suffering a valid recovery.

The next trust to be noticed is, that the trustees are to sell to pay debts, in case of deficiency of the personal estate. It appears from the case that there was such deficiency; consequently the trustees had an estate in fee to enable them to sell, and they have, in fact, sold part of the estates accordingly, and I presume (though it is not so stated in the case) that they have sold enough to pay the debts, and that therefore there does not remain any thing more to be done by them in that respect. Then a question arises, whether, as the object of that part of the trust has been performed, there was any estate remaining in the trustees which had been created for the purposes of this trust. It might appear, according to the case of *Player v. Nicholls* (b), that the object of the trust being performed the estate of the trustees in fee-simple should cease also: but inasmuch as the power of the trustees as to this arose upon a contingency, and that contingency has happened, they had a full power to sell any part of the premises; and then, as the will does not confine their power to sell so much as should be sufficient to pay the debts, and also as there is no devise over of such parts as should remain unsold, we are of opinion that the trustees retained the fee-simple created by the will in the whole of the estates of the testator, according to the qualification of the rule in *Doe d. Shelley v. Edlin* (c). It is true that the beginning of the language of the power to sell says, "any part" of the estate, and does not say "the whole or any part," but the latter part of the

(a) 3 B. & P. 178.

(c) 4 A. & E. 582.

(b) 1 B. & C. 536.

power says, "*the said premises or any part thereof,*" and we think the legal effect of this, taken altogether, is to extend the power over the whole. The case of *Warter v. Hutchings* (a) was, in some respects, the same as to limitations as the present; and though there was a devise in fee to the trustees, this Court held they only took a chattel interest; but the limitations were very complicated, and we consider the decision as having turned on the particular circumstances, and not on the general point of the trustees taking the fee; and we do not think that case sufficient to vary what we consider the general principle, so as to give a chattel interest only to the trustees.

Then as the trustees, in our opinion, have a general fee-simple in the whole of the estate, it is to be considered how that affects the recovery; and upon that we think such fee-simple absorbs the freehold which they had for the payment of the annuity to *Jane Dalston Hodgson*, though not as a regular merger, and that the case is to be considered as upon the estate in fee being in the trustees. We think that they have the legal estate in fee, and that *Isabella* has an equitable estate in tail; and therefore she may suffer an equitable recovery, which will have the effect of barring all equitable remainders over, though it would not bar legal remainders. Then, is the remainder to the lessor of the plaintiff and *Jane Dalston Hodgson* a legal or an equitable remainder? We are of opinion that it is an equitable remainder. It is of the same quality in that respect as the estate to *Isabella*; the trustees have the legal estate, and therefore the remainder over is barred.

We are of opinion therefore that the lessor of the plaintiff is not entitled to recover, and the judgment will be entered as agreed in the case.

Judgment for the defendant.

(a) 1 B. & C. 791.

END OF HILARY TERM.

1838.  
  
 DOE  
 d.  
 CADOGAN  
 v.  
 EWART,

## EASTER TERM,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,  
 Lord DENMAN C. J.      PATTESON J.  
 LITLEDALE J.              COLERIDGE J.

In the Bail Court,  
 WILLIAMS J.

1838.

*Thursday,  
 April 19th.*

FIELD and another *v.* JOSEPH ROBINS.

The plaintiffs having sued one of two obligors to a joint and several indemnity bond, after declaration, but while the damages were unliquidated, accepted from him 215*l.*, stating it in a receipt to have been accepted in discharge of the damages and costs in that action. The plaintiffs afterwards brought another action on the same bond against the other obligor, and recovered a verdict for 1098*l.* 14*s.* 11*d.* The Court held, that the composition in the former action was not a discharge of the whole damages on the bond, and refused to set aside the verdict.

**DEBT** on bond for 2000*l.*, bearing date April 19th, 1822, and given by the defendant to the plaintiffs, to indemnify them from liability in respect of a bond given by them to the Crown, as sureties for the defendant's duly discharging his duties as storekeeper to the ordnance. The breach assigned was, that the defendant had not indemnified the plaintiffs. On oyer, the bond appeared to be the joint and several bond of the defendant and *James Robins*. Plea, that after forfeiture of the bond, and while the damages were unliquidated, and before the commencement of this suit, *Joseph Robins* had paid 215*l.* to the plaintiffs in satisfaction of the breaches of the said bond, and that plaintiffs accepted the said sum in satisfaction as aforesaid. The replication traversed the above allegations in the plea.

At the trial before Lord *Denman* C. J., at the London sittings after last Hilary term, it appeared that a previous action had been brought against *James Robins* on the same bond, and that after declaration a settlement had been come

to by his paying the plaintiffs 215*l.*; and that they thereupon gave him the following receipt:—

“Received of *James Robins* the sum of 215*l.*, being the amount which we have agreed to accept in discharge of the damages and costs in this action.

(Signed)

*George Field,  
J. P. Hayler.”*

For the defendant it was contended, that the above settlement with one of the obligors must be taken as a settlement of the entire cause of action, in respect of which they were both liable. For the plaintiff, *Watters v. Smith* (a) was cited. The jury, under the direction of his lordship, returned a verdict for the plaintiffs for the amount to which they proved themselves damnified, 1098*l.* 14*s.* 11*d.*, but leave was given to move to enter the verdict for the defendant.

Sir *F. Pollock* now moved to enter the verdict accordingly. *Watters v. Smith* (a), which was cited for the plaintiff at the trial, differs essentially from the present case. There, a joint contractor with the defendant, who had been sued alone for a debt actually due by them to the plaintiff, compromised the action against himself by paying part of the debt and the costs, and it was held that this composition did not operate as a discharge of the whole debt, so as to afford any defence to the defendant in the subsequent action. But in that case the sum paid was intended to satisfy nothing beyond the proportion for which the particular party paying it was liable; it was accepted on that understanding, and the debt was actually due at the time. But here 215*l.* was paid while the damages were unliquidated; no debt was therefore in existence.

*Per Curiam* (b).—It is not because the case cited for the plaintiff falls short of the mark, that we are therefore to

(a) 2 B. & Ad. 889.

*Hedale, Patteson, and Coleridge*

(b) Lord Denman C. J., *Lit- J.*

1838.

FIELD  
and another  
v.  
ROBINS.

1838.

FIELD  
and another  
v.  
ROBINS.

say the defendant is entitled to succeed, for the onus lay upon him to shew affirmatively that the composition in the former suit was taken as a settlement of the entire cause of action; a thing not very probable, if considered with reference either to the proportion which the sum paid bears to the amount of the whole damages, or to the very language of the receipt itself.

Rule refused.



Friday,  
April 20th.

TAYLOR v. DENING and others.

A devise is sufficiently signed within the 5th section of the Statute of Frauds, by the devisor putting his mark, instead of signing his name to it, although he was an educated person and able to write well.

**TRESPASS** for breaking the plaintiff's close and cutting down trees. Plea,—*Liberum tenementum* in the defendant, *Dening*, and that the others entered as his servants. At the trial before Lord Denman C.J., at the last Devonshire spring assizes, it appeared that the defendant claimed as devisee of one *John Dening*, under a devise dated the 9th January, 1833, which was alleged by the plaintiff to have been revoked by a codicil of the 4th December, 1835. The codicil in question was duly attested, but the testator, although an educated person, and able to write well, had put a cross as his mark, instead of signing his name to it. It appeared that at the time of his so executing the codicil, he was suffering from paralysis, so that he would have had great difficulty in writing, but the evidence did not shew that it would have been impossible for him to have signed his name. For the defendant it was contended, that, under these circumstances, the codicil had not been properly signed within the 5th sect. of the Statute of Frauds, 28 & 29 Car. 2; but his lordship was of a contrary opinion, and directed a verdict for the plaintiff, giving leave to the defendant to move to enter a nonsuit.

*F. N. Rogers* now moved accordingly. It is singular that there is no case to be found which establishes that the mark,

even of an illiterate testator, is equivalent to signing within the statute. In *Lemayne v. Stanley* (a), it was held, that a will written in the testator's hand, and commencing "I, *John Stanley*," was well signed, for that the statute does not say where the will shall be signed. Three of the judges in that case, *Levinz J.* dissenting, further intimated, that sealing a will would be a good signing, for that *signum* is no more than a mark, and that sealing is a sufficient mark. But it was afterwards decided in *Smith v. Evans* (b), that sealing is not sufficient, on the ground that, if it were held to be so, it would be very easy to forge any man's will by forging the names of obscure persons, who were dead, as witnesses, for there would be no occasion to forge the testator's hand. Lord *Hardwicke* also, in *Grayson v. Atkinson* (c), and *Willes C. J.* in *Ellis v. Smith* (d), make some strong observations upon this point; and in *Wright v. Wakeford* (e) also the distinction between sealing and signing is referred to. If then it is clear from the authorities, that sealing cannot be substituted for signing, à fortiori marking cannot, which is much less formal than sealing. It appears from *Harrison v. Harrison* (f) and *Addy v. Grix* (g), that attestation of a devise by a mark is good, but it did not appear in those cases that the witnesses were able to write. The testator here was a literate person, and the evidence at the trial shewed that his illness made it difficult, but not impossible, for him to sign his name. The statute must have intended that a man's will should be evidenced by his ordinary mode of signature, whatever that may be; the testator's ordinary mode here was by writing and not by marking.

Lord DENMAN C. J.—We ought not to encourage the slightest doubt on this question by granting a rule. The

1838.  
  
 TAYLOR  
 v.  
 DENING  
 and others.

(a) 3 Lev. 1; S. C. Freem.  
 538.

(b) 1 Wils. 313.

(c) 2 Ves. sen. 459.

(d) 1 Ves. jun. 13.

(e) 17 Ves. jun. 459.

(f) 8 Ves. jun. 185.

(g) 8 Ves. jun. 504.

1838.

TAYLOR  
v.  
DENING  
and others.

disallowance of sealing affords no inference with respect to putting a mark; for sealing and signing, in common language, mean very different things. A testator has always been considered to have satisfied the statute by putting his mark to his will, and if his mark was properly verified, I never heard of any inquiry as to his capacity to sign his name. We have no doubt on the question.

LITLEDALE J.—The word “signing” is used in the statute now under consideration, and also in 3 & 4 *Anne*, c. 9, and 17 *Geo. 3*, c. 30, as to promissory notes and bills of exchange of small amount, the putting a person’s mark to which instruments has always been considered sufficient. Any investigation into a testator’s capacity to sign his name would be very troublesome and very dangerous, for it is difficult to define such a capacity. A man may not be able to sign his name at all, or he may do so with very great difficulty, and after all not do it legibly, and put his mark to save trouble. In this case the testator was paralytic, and might naturally find it inconvenient to sign his name.

PATTESON J.—It is conceded that an illiterate testator may satisfy the statute by putting his mark to his will; but the present argument would throw upon the Court a strange inquiry in all cases of marksmen, as to whether they could write or not. I do not see, even if a man can write well, why he may not set his mark to his will, if he prefers it, instead of signing his name.

COLERIDGE J.—I should be very sorry if our decision were to introduce any laxity in the practice of executing wills. We have, however, merely to construe the statute, and are bound to decide, as a mere matter of law, whether marking is signing. No distinction is suggested in the statute between learned and unlearned persons with respect to the formalities to be observed in the execution of their

respective wills; the only word used is "signing," which must be applicable therefore to all classes of persons.

1838.

TAYLOR

v.

DENING  
and others.

Rule refused.

## ASHBY v. MINNETT and others.


Friday,  
April 20th.

**TRESPASS** for taking the plaintiff's goods. Pleas: 1, not guilty; 2, that the goods were not the property of the plaintiff *modo et formâ*.

At the trial, at the last Nottinghamshire assizes, before *Littledale J.*, it appeared that a person of the name of *Brennan* being indebted to various persons, and amongst others to the defendants, gave a cognovit to a relative, who was also one of his creditors, upon which judgment was entered up, and execution issued against his goods. The plaintiff, to assist *Brennan*, bought the goods in question (which consisted of a grocer's stock) of the sheriff, but he did not remove them off *Brennan's* premises, and allowed him to carry on his business of grocer as before. The defendants then proposed to shew that *Minnett* had taken the goods in execution under a judgment against *Brennan*. This evidence was objected to, but admitted subject to the opinion of the Court. The learned judge directed the jury to say, whether the sale from the sheriff to the plaintiff was *bonâ fide* or not. The jury found the first issue for the plaintiff; second, that the sale to the plaintiff was fraudulent, and the verdict was entered for the defendant, with leave to enter it for the plaintiff, damages 100*l.*, if the defendant was not at liberty to prove that he was a judgment creditor.

*T. Hildyard*, on a previous day in this term(a), moved

(a) April 19th, before Lord Denman C. J., *Littledale, Patteson*, and *Coleridge Js.*

1838.  
  
 ASHBY  
 v.  
 MINNETT  
 and others.

accordingly. As it appeared by the evidence that the plaintiff was in possession of these goods, which he bought at the sale from the sheriff, the only issue at the trial was proved for the plaintiff. On the record, therefore, the defendant is a wrong<sup>d</sup>-doer, and his defence that the sale was fraudulent should have been pleaded. In *Howell v. White (a)*, *Patteson J.* ruled expressly, that under this issue a defence like the present should be pleaded specially. [*Patteson J.* That case is not of much authority, for it was a ruling at nisi prius against the party who got the verdict. There was no opportunity therefore of having it considered. Lord *Denman C. J.* The issue the defendant undertakes to prove is, that the goods are not the plaintiff's; how can that be done, except by showing that they are the goods of himself or of some one else? *Littledale J.* If this defence was not evidence under this issue, what plea could you frame to meet the case?] A plea might be framed, probably it would be necessary to give colour. All that the second plea does is to throw upon the plaintiff the burden of proving a *prima facie* title. To avoid that title there should have been a special plea.

*Cur. adv. vult.*

Lord DENMAN C. J. now stated the opinion of the Court to be, that the evidence was admissible.

Rule refused.

(a) 1 Moo. & Rob. 400.



1838.

Friday,  
April 20th.

BARRACLOUGH and others v. JOHNSON and others.

**TRESPASS** for breaking and entering the plaintiffs' close. Pleas: first, not guilty; second, a right of way. At the trial at the last spring assizes at York before *Patteson J.*, it appeared that the plaintiffs admitted a foot and bridle way over the locus in quo, which was called Green Gate Lane, but the struggle was as to there being a carriage way over it. The plaintiffs' witnesses admitted a user by the public with carts &c. for the last thirty years, but they put in a document signed by thirteen inhabitants of the hamlet of Mortomley, in the year 1795, who were all dead except one, who was called as a witness. The document stated that the Green Gate Lane was the private property of Mr. *Parkin*, the ancestor of the cestui que trust of the plaintiffs and of Sir *Watts Morton*, subject to a public foot and bridle way; and the witness stated that it was drawn up at a public meeting of the hamlet, which was called in order to resist the repairs of the road being thrown upon them. This document was objected to, but received by the learned judge. The plaintiffs further proved, that in 1814 the executor of Mr. *Parkin* made a verbal agreement with the *Thorncliff Colliery Company* and the surveyor of highways of the hamlet, by which he was to allow them to use the road; the company to pay 5s. a-year, and supply cinders for repairs, and the hamlet to lead and spread the cinders. The 5s. a-year was paid up to 1832, when a new arrangement was entered into by the company; the hamlet also found cinders during a portion of the time, but from 1832 no one was allowed to pass unless they left cinders on the

1. On an issue as to a right of way, a document upwards of forty years old was produced, signed by thirteen inhabitants of a hamlet, twelve of whom were dead, which appeared to have been drawn up at a public meeting called to resist the repairs of the road being thrown upon the hamlet. The document contained a declaration, that the locus in quo was not a public road: Held that it was admissible as evidence of reputation.

2. A road had been used by the public without interruption for about thirty years, but it appeared that in 1814, twenty-two years before the action commenced, an agreement was made by the owner of the soil on one side, and a company and the surveyor of highways of the hamlet and others on the other side, by which the owner agreed to let them use the road on the company paying 5s. a-year, and finding cinders, and the hamlet leading and spreading them:—Held, that although the evidence of user per se would shew a dedication by the owner of the soil, it was explained by the agreement of 1814, and that the agreement only amounted to a license to use the road during such times as the conditions in it should be observed.

3. *Quære*, whether there can be a conditional dedication of a right of way to the public.

1838.

**BARRACLOUGH**  
and others  
v.  
**JOHNSON**  
and others.

road. The learned judge told the jury, that although the user by the public, taken by itself, was evidence of a dedication, the user was explained by the agreement of 1814, and that, unless the jury found that Mr. *Parkin* intended to dedicate the road to the public, the bargain having been broken, the verdict should be for the plaintiffs. A verdict having passed for the plaintiffs,

First point:  
A document  
signed by pa-  
rishioners at a  
meeting of the  
township to  
resist the re-  
pairs of a road,  
not evidence  
of reputation.

*Atcherley* Serjt. now moved for a new trial. The document signed by the parishioners was inadmissible. It was not evidence of reputation, but the mere declaration of individuals touching a matter in dispute, about which their own interests were concerned. [*Coleridge J. Nicholls v. Parker*(a) is an authority that the declarations of parishioners as to the parish boundary are evidence, although they are interested.] Even if it were admissible generally, in this case it was *post litem motam*, for it appears to have been drawn up after an attempt to charge the hamlet with the repairs.

Second point:  
If the owner  
of land allow  
the public to  
use it as a  
highway for  
30 years, a de-  
dication must  
be presumed.

II. The direction of the learned judge was wrong, for he took off the attention of the jury from the continued public user of the road, and asked them if Mr. *Parkin* intended to dedicate the road in 1814. It is submitted, that, as an owner of land must intend all the consequences legally deducible from his acts, if he allows the public to use his land as a road for thirty years, he does in fact dedicate it to the public. If he meant to give a mere licence to certain parties, he should do some act to shew his intention. This law was laid down by *Patteson J.* in *The Trustees of the British Museum v. Finnis*(b). So in *Rex v. Lloyd*(c), Lord *Ellenborough C.J.* laid down, "if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public." [Lord *Denman C.J.* *Wood v. Veal*(d) is

(a) 14 East, 331, n.

(b) 5 C. & P. 460.

(c) 1 Camp. 260.

(d) 1 D. & R. 20; 5 B. & Ald.  
454.

opposed to that doctrine.] But supposing even that the dedication was intended to be qualified, the intention was not communicated to the public. It was a complete dedication in fact, liable to be revoked indeed, but the condition was contained in a private agreement unknown to the public. Even if the dedication had been partial, and there had been an unrestricted user, it would amount to a complete dedication. If an owner of the soil allows the public to go over his lands for thirty years, he has conferred an easement which he cannot recall.

1838.

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BARRACLOUGH  
and others  
v.  
JOHNSON  
and others.

Lord DENMAN C. J.—I think there is no ground for a rule on either of the points. As to the admissibility of the document, it may be admitted that it is but slight evidence of reputation, for it is no more than a declaration by persons denying their liability to be charged, but still it is evidence; and I do not see how it could be rejected. On the point of the dedication of the road to the public, it is true that the acts of user, taken by themselves, might be evidence from which a dedication could be inferred, but in this case they were all referable to the agreement; and when the agreement is looked at, it clearly appears to be no more than a conditional dedication (as it were), which no doubt was a matter of convenience to both parties. Then comes the question, whether there can be a conditional dedication, and perhaps there cannot; for the meaning of dedication is a giving to the public full right of using as a way the particular ground in question, which seems incompatible with the reservation of a right to put an end to the easement at any time(a). But if this be so, in the present case I think there was no dedication at all, but only a licence given to use the road under certain circumstances, in the absence of which circumstances the licence of course would not operate.

First point.

Second point.

LITLEDALE J.—The document put in to prove reputation was but slight evidence, and not of the nature usually tendered to prove reputation, but still it was evidence.

First point.

(a) On this point see *Marquis* 257; see also *Rex v. Leake*, 2 N. of *Stafford v. Coyney*, 7 B. & C. & M. 583.

1838.

BARRACLOUGH  
and others

v.

JOHNSON  
and others.

Second point.

As to the dedication, the user was *primâ facie* evidence of it, but the inference to be drawn from that is rebutted by the agreement. Fault is found with the expressions of my learned brother as to the intention with which the road was dedicated, but I think there must be a clear intention to dedicate in order to constitute a dedication. I do not mean to say, that if an owner of land allows the public a right of way for a series of years, his saying once or twice during that time "this is not a public way," without taking any further steps about it, would be such an indication of intention as to prevent the user by the public being referred to dedication; but even then the question would be on the intention of the party, and that would be gathered from his having allowed the right of way to the public for so long a period without taking any steps to prevent the user. I therefore think the intention of the owner of the soil very material.

First point.

PATTESON J.—I had some difficulty at the trial as to the admissibility of the document, but I did not see on what ground it could be rejected as inadmissible, though of so little value. With regard to the evidence as to the intention

Second point.

to dedicate by the owner of the fee, I think the term "dedication" implies that there must be such an intention. A man's land cannot be converted into a road of any sort without his consent, and that consent he may give on any terms he pleases. In the present case all the evidence shews that the permission was obtained by the company to go on the land on certain terms. What were the 5s. paid for? Clearly to purchase the consent of the proprietor to go on the land. The nature of the transaction was quite clear, the owner of the land was glad to have his road kept in good repair, which he might use as an occupation road, and the company were content to pay the acknowledgment and the materials for repair for the permission to go on the road. The inhabitants of the hamlet were also permitted to use the road on a like condition. There is no ground whatever on the merits for disturbing the verdict.

COLERIDGE J.—The grounds on which the evidence as to reputation was objected to are, first, that the document proceeded from parties interested; and second, that in order of time it was *post litem motam*. *Nicholls v. Parker* (a) disposes of the objection, that hearsay evidence is inadmissible, because the witnesses are interested; and as to the second objection, there is no evidence whatever of any dispute or litigation, except as to the liability of the hamlet to repair this road.

1838.

BARRACLOUGH  
and others  
v.  
JOHNSON  
and others.

First point.

With regard to the second point, the ruling of my learned brother must be taken in connection with the circumstances of the case; the facts of user by themselves would imply a dedication, because from them the jury might infer that the owner of the fee *intended* to dedicate. But the other facts of the case cannot be excluded, and they shew that Mr. *Parkin* did not intend to dedicate, either provisionally or absolutely, but only that he gave a licence to use the road so long as the 5s. a-year was paid and the cinders supplied. If the argument is valid that a user for nineteen years on the terms of the agreement implies a dedication, and prevents a non-compliance with the agreement on the part of the company from having the effect of terminating the licence, it must follow, that a breach by the company at the end of nineteen days would not have cancelled the agreement; for if there was a dedication, it must have taken place at the date of the agreement.

Second point.

Rule refused.

(a) 14 East, 331, n.

## HURST v. ORBELL.

Friday,  
April 20th.

**ASSUMPSIT** for 80*l.* money had and received, and on an account stated. Plea, non assumpsit. At the trial at paid, on condition that the purchaser might return them within a month, allowing 10*l.* off the above sum, and that he should pay 10*l.* extra if he kept them:—Held, that the purchaser, having so returned them, might maintain money had and received for the 70*l.*, as the seller was to be considered a stakeholder for the party entitled at the end of the month.

Where two  
horses were  
sold for 80*l.*  
and the money

1838.  
  
 HURST  
 v.  
 ORBELL.

Maidstone at the last spring assizes before *Tindal C. J.*, it appeared that in December, 1837, the plaintiff negotiated with the defendant for the purchase of a pair of horses, for which the defendant asked 90*l.*; the plaintiff offered 80*l.*, which the defendant refused; the plaintiff then offered the defendant to give him the other 10*l.* if he liked the horses at the end of a month, but he was to be at liberty to return the horses at any time during the month, allowing 10*l.* out of the 80*l.* The defendant assented to this, upon which the plaintiff paid the defendant 80*l.*, and the following receipt was given:—

“ £80. Romford, December 14th, 1837.

“ Received of — *Hurst*, Esq. eighty pounds for two grey horses, warranted sound and quiet in harness. Ten pounds more if the horses are kept.

(Signed) “ *Henry Orbell*.”

The horses were delivered and returned within a month. The plaintiff in his particulars claimed 80*l.* for money had and received. *Peacock*, for the defendant, contended that the plaintiff ought to have declared on the special contract, or that he ought to have proved his readiness to pay the 10*l.* before he could proceed for the 70*l.* as money had and received; the learned judge overruled the objection, but gave the defendant leave to move to enter a nonsuit, and the verdict passed for the plaintiff, damages 70*l.*

*Peacock* now moved accordingly. Where money has been paid under a special contract, money had and received will not lie unless the contract is rescinded in toto, and then the whole sum paid can be recovered back. Here the plaintiff did not attempt, and was not entitled to recover back more than 70*l.* The rule of law is, that the money to be recovered must be the money of the plaintiff's, but in this case the contract was completed; the horses were the property of the plaintiff, the money was paid to the defendant, and only a certain portion of the money was recoverable back. The declaration, therefore, should have

been on the special contract, *Towers v. Barrett (a)*, just as the defendant must have sued on the special contract if the plaintiff had not paid the 10*l*. There was a part-execution of the agreement here, as in *Hunt v. Silk (b)*, which prevents the action for money had and received being resorted to, and the money paid was not the money of the plaintiff.

1838.  
  
 HURST  
 v.  
 ORBELL.

LORD DENMAN C. J.—I think the distinction taken is too fine. The defendant held the money on the terms that it should be given back to the plaintiff if he was eventually entitled to it.

LITLEDALE J. concurred.

PATTESON J.—This is the common case of a contract on sale or return, with a certain sum to be paid by way of hire if return should be made; the money was paid over to the defendant, on the contract that it should eventually be the property of the person entitled to it at the end of the month.

COLERIDGE J. concurred.

Rule refused.

(a) 1 T. R. 133.

(b) 5 East, 449.

RANDELSON v. MURRAY and another.

Saturday,  
 April 21st.

CASE. The declaration stated, that defendants were the possessors and occupiers of a warehouse in Liverpool, for the reception, custody, and transmission of goods and merchandise, and that it was the duty of defendants to use and employ in the said warehouse proper and sufficient from their warehouse. The master porter engaged a master carter, and both of them attended with their men. During the process of lowering it from the warehouse, the barrel fell and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter. The defendants were held to be liable.

The defendants, who were occupiers of a bonded warehouse, engaged a master porter to lower and convey a barrel of flour

1838.

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 RANDELSON  
 v.

MURRAY  
 and another.

tackle, implements, and materials, in and about the receiving and sending away the said goods and merchandise, and in and about the raising and lowering the same, and also to use and employ proper skill and care in fastening and securing with the said tackle, implements, and materials, the said goods and merchandise, whilst the same were being so received and transmitted, and to use due and proper care and attention in raising and lowering the same, so that they might be received and transmitted &c., without damage or injury, to the persons employed in delivering or receiving the same. The declaration then stated, that the plaintiff was employed in receiving a barrel of flour from the said warehouse, and that the defendants so negligently and unskilfully applied the said tackle in lowering the said barrel, that the same slipped and fell upon the plaintiff and broke his leg, &c. Pleas: 1. Not guilty. 2. That defendants, at the time when &c., were not employed in lowering the said barrel. Issue was joined on both the above pleas.

At the trial before *Coleridge J.* at the last Liverpool assizes, it appeared that there is at Liverpool a class of men called master porters, whose services are commonly employed by the merchants of that place in moving goods; that on the occasion in question the defendants, who were merchants and tenants of a bonded warehouse in that city, sent for a master porter of the name of *Wharton* to convey a barrel of flour from their warehouse; that the master porter came attended by his men, and that shortly after, a master carter, whom *Wharton* had sent for to assist, arrived with his men also. So much of the tackle and machinery employed in lowering the barrel as was attached to the warehouse, and belonged to the defendants, was in proper order; the only thing in fault was a rope brought by the master porter, the defectiveness of which occasioned the barrel to fall upon the plaintiff, one of the master carter's men, whereby his leg was broken. The jury found a verdict for the plaintiff, damages 100*l.*, but leave was given to

move for a nonsuit, on the ground that the defendants were not liable for the accident.

1838.


 RANDELSON

v.

MURRAY  
and another.

*Alexander* now moved for a rule accordingly. The master carter was liable for the injury done in this case, and not the defendants. *Bash v. Steinman* (a), it is true, seems unfavourable to the defendants. The defendant in that case, having a house by the road side, contracted with a surveyor to put it in repair for a stipulated sum; a carpenter took a contract under the surveyor to do the whole work; he employed a bricklayer under him, and the bricklayer again contracted for some lime with a lime-burner; the lime-burner's servant left a heap of lime in the road, which caused the injury for which the action was brought, and the defendant was held liable, although *Eyre C. J.* admitted he had great difficulty in stating the precise principle on which the judgment of the Court proceeded. This Court also appears to have been sensible of the same difficulty in *Laugher v. Pointer* (b), where the judges were divided in opinion; *Abbott C. J.* and *Littledale J.* holding, that where the owner of a carriage had hired horses for the day of a stable-keeper, who also provided the driver, the owner of the carriage was not responsible for the consequences of negligent driving, and *Bayley J.* and *Holroyd J.* that he was responsible. But in these and other cases where the principle of respondeat superior has been applied, the party immediately causing the injury seems to have been considered the defendant's servant. The distinction in this case is, that the master porter was not defendants' servant, but rather a bailee. But even in the case of a servant, *Harris v. Baker* (c) furnishes an authority that injuries occasioned by his negligence are not invariably to be visited on his employers. Trustees were empowered and required to make a road, and to place lamps along it, if they should think necessary, and the plaintiff's wife had

(a) 1 Bos. &amp; Pul. 404.

(c) 4 M. &amp; S. 27.

(b) 5 B. &amp; C. 547; 8 D. &amp; R. 556.

1838.

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 RANDELSON  
 v.

MURRAY  
 and another.

fallen over a heap of scrapings left on the road side without any lights, by a labourer in their employment; yet the trustees were held not liable. The liability of the present defendants cannot be put on the simple ground that they employed *Wharton* for their own benefit, for in *Witte v. Hague and another (a)*, the defendants, who were engineers, had been employed by a person for his benefit to erect a steam-boiler on his premises, and it was held they were properly sued for an injury done to the premises of a neighbour by the bursting of the boiler, because they were present, and had the management of the apparatus at the time of the accident. *Wharton* also was present, and had the management in lowering this barrel, and stood in the same relation to the defendants with the engineers in that case to their employer. [*Littledale J.* Are the master porters subject to any regulation by the corporation of Liverpool?] That did not appear. The owner of goods sent by a carrier would not be liable if they fell out of the carrier's cart and injured a person passing by. Nor can it be material whether the accident happened on the defendant's premises or at a distance. If a chimney-sweeper, in sweeping a person's chimney, were to knock a tile off the house, his employer would not be liable. *Wharton* should be responsible in this case, which would prevent circuity of action.

LORD DENMAN C. J.—I think the defendants are properly sued; it makes no difference whether they employed people of their own to move their goods, or procured others who were likely to move them more expertly, and left it to their superintendence.

LITTLEDALE J. concurred.

PATTESON J.—This case is obviously distinguishable from the case put of injury occasioned by goods falling

(a) 2 D. & R. 33.

from a carrier's cart, when the owner is entirely out of the control and possession of them.

COLERIDGE J. concurred.

Rule refused.

1838.

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RANDELSOHN  
v.  
MURRAY  
and another.

—◆—  
GORE v. WRIGHT.

**DEBT.** Declaration stated that the plaintiff demised to the defendant a messuage for a term of forty-five years and three quarters, to be computed from the 29th September, 1812, at the yearly rent of 28*l.*, payable by equal quarterly payments, the 25th March, the 24th June, the 29th September, and the 25th December. That defendant entered and was possessed until the 25th March, 1837, when 63*l.*, being the rent for two years and one quarter, ending the day and year last aforesaid, became due, which sum is still unpaid, &c.

Pleas: 1. *Nunquam indebitatus*. 2. That the plaintiff seeks to recover the said sum of 63*l.*, alleged to be due to the plaintiff for the rent of the said messuage for the space of two years and one quarter of a year ending upon the said 25th day of March, 1837. That the defendant held the said messuage at the said rent of 28*l.*, payable quarterly, on the days and at the times in the declaration above mentioned; and that before the said sum of 63*l.*, or any part thereof, accrued or became due, and more than two years and a quarter before the said 25th day of March, 1837, being the day as aforesaid when the said sum of 63*l.* is supposed to have been due, and before the 25th day of December, A. D. 1834, that is to say, on the 17th day of April, 1834, it was agreed by and between the plaintiff and the defendant, that the defendant should quit and deliver up to the plaintiff, and that the plaintiff should take the possession of the said messuage before the said 25th day of December, 1834, and that in consideration thereof the defendant should be discharged from all liability to pay any

*Saturday,  
April 21st.*

To debt for rent due under a demise, the defendant pleaded, that before the rent became due it was agreed between the plaintiff and defendant, that in consideration of his giving up possession he should be discharged from any further rent, and that he had given up possession accordingly, concluding with an allegation that the tenancy was thereby surrendered. Held, that the plea was not to be taken as setting up a surrender so as to require a memorandum in writing, but that it afforded a valid excuse for non-payment of the rent, by shewing the agreement and the giving up of possession.

1838.

GORE  
v.  
WRIGHT.

further rent which would otherwise become due for the occupation of the said messuage after the 25th day of December, 1834. That in pursuance of the said agreement the defendant afterwards, to wit, on the said 17th day of April, 1834, being before the commencement of this suit, and before the said sum of 63*l.*, or any part thereof, accrued or became due, and more than two years and a quarter before the said 25th day of March, 1837, and before the said 25th day of December, 1834, did quit and deliver up possession of the said messuage to the plaintiff, and the plaintiff then accepted such possession thereof in pursuance and on the terms of the said agreement, and in discharge of the liability of the defendant to pay further rent or compensation for the said messuage; and the plaintiff on the said 17th day of April, 1834, accordingly entered into and upon the said messuage, and thenceforth hitherto hath remained in possession thereof, and the defendant hath not at any time since he so quitted and gave up possession of the said messuage held or enjoyed the same, and the said tenancy and the defendant's said interest was thereby then surrendered and extinguished. Verification.

Replication, joining issue upon the first plea. And as to the second plea, that the defendant did not, in pursuance of the said agreement in the said last-mentioned plea, quit and deliver up possession of the said messuage to the plaintiff, nor did the plaintiff accept such possession thereof in pursuance and on the terms of the said agreement, and in discharge of the liability of the defendant to pay any more or further rent or compensation for the said messuage; nor did the plaintiff then enter into and upon the said messuage and premises, with the appurtenances, in manner and form as in the said last plea is alleged.

The action was tried before *Williams J.* at the Middlesex sittings of this term, when a verdict for 63*l.* was found for the plaintiff on the first issue, and for the defendant on the second issue.

*Platt* now moved to enter judgment for the plaintiff on the second issue, non obstante veredicto. The second plea was intended to set up a surrender of the term by operation of law, but the agreement and the facts pleaded do not amount to a surrender, so as to satisfy the third section of the Statute of Frauds. The plea concludes with an allegation that "the tenancy was thereby surrendered and extinguished." But that is merely the defendant's legal inference from the facts previously stated, and is not warranted by them, for the plea states that the defendant did "quit and deliver up possession," not that he "surrendered." No other party has been accepted for tenant in the defendant's place, as in *Thomas v. Cooke (a.)* [*Patteson J. Whitehead v. Clifford (b)*], where the landlord gave up his claim to the rent on the tenant giving up possession of the premises, is near this point.]

1838.  
GORE  
v.  
WRIGHT.

*Cur. adv. vult.*

LORD DENMAN C. J., on a subsequent day in this term (April 27), delivered the judgment of the Court. We do not consider that the plea in this case sets up a surrender of the tenancy, but that it affords a valid excuse for the non-payment of rent, by shewing the agreement to forego payment of it in consideration of the delivery up of premises, and that the premises were delivered up accordingly. The rule therefore must be refused.

Rule refused.

(a) 2 B. & Ald. 119.

(b) 5 Taunt. 518.



1838.

Saturday,  
April 21st.

Where cattle have escaped from an adjoining close into that of the defendants, through defect of fences, which he is bound to repair, he is not justified in driving them out into the highway and leaving them there, although it may be their best way back.

*Quere*, would he be justified, if he had not left them there, but had conducted them back to the close from which they had escaped.

CARRUTHERS v. HOLLIS and another.

**TRESPASS.** The second count of the declaration stated, that the defendant chased and drove about the plaintiff's sheep, then being upon a certain close, from and off the said close into a certain highway, and there left them.

Plea, that at the time when &c., the defendant *Hollis* was lawfully possessed of the said close, and because the said sheep were wrongfully in the said close, the defendant *Hollis*, in his own right, and the other defendant as his servant, drove the said sheep out of the said close into a certain highway adjoining the said close, and there left the same for the plaintiff, doing no unnecessary damage to the plaintiff on that occasion, as the defendants lawfully might for the cause aforesaid. Verification.

Replication, that at the time when &c., plaintiff was lawfully possessed of a certain close, contiguous and next adjoining to the said close of the defendant *Hollis*, and that the defendant *Hollis*, and all other the tenants and occupiers of the said close, from the time whereof &c., have repaired &c., and of right ought to repair the hedges and fences between the said close of the said *Hollis*, and the said close of the plaintiff, in order that cattle being in those closes respectively, might not err or escape out of the one into the other of them through the defects of the said hedges and fences; and because the said hedges and fences were in decay for want of necessary repair thereof, the said sheep being in the said close of the plaintiff, a little before the said time &c., erred and escaped from and out of the said close of the said *Hollis*, in which &c., through the defects of the said hedges and fences between those closes, and on that occasion were in the said close of the said *Hollis*, in which &c., until the defendants, of their own wrong, chased and drove about the said sheep from and off the said closes into the said highway, when and where the defendants left the said sheep. Verification.

Rejoinder, that the said sheep did not err or escape from or out of the said close of the plaintiff into the close of the said *Hollis*, through the defects of the said hedges and fences. Issue thereon.


At the trial before *Gurney B.*, at the last assizes for Monmouth, the plaintiff obtained a verdict on this issue.

*R. V. Richards* now moved to arrest the judgment. It is submitted that, where cattle escape into a close from defect of fences, the tenant of the close is justified in driving them out, although he is the person bound to repair the fences. It is clear he is not bound, because his fences were in fault, to entertain the cattle as long as the owner of them allows them to remain; for he may bring trespass, or distrain them, if suffered to continue there after notice: per Serjeant *Williams*, in note (4) to *Poole v. Longueville* (a). It cannot be disputed that the tenant of the close would have had a right to drive them back to the place from which they had escaped; and it is now contended that he is not obliged to drive them all the way back. It is consistent with these pleadings that the highway, into which the sheep were driven, was the nearest and best way for the sheep to return. If so, the defendant satisfied his duty by turning them into the highway, and was not required to attend them home. The passage back from the defendant's to the plaintiff's close might be precipitous and impracticable, and the course pursued by the defendant be the only safe course for restoring the sheep.

Lord DENMAN C. J.—(After stating the pleadings.) No authority has been cited in this case, nor is it likely that any authority could be found. It appears that the sheep escaped through the neglect of the defendant to repair fences; he was bound, therefore, to do his utmost to replace the sheep. Even if the highway was the best road for them back, and he drove them into it for the purpose of

(a) 2 Wms. Saund. 285.

1838.

  
CARRUTHERS  
v.  
HOLLIS  
and another.

1838.

CARRUTHERS

v.

HOLLIS  
and another.

restoring them, he stopped short of his duty, for he should not have left them there.

LITLEDALE J.—I am of the same opinion.

PATTESON J.—The plea might be very well if it stood alone, but the replication is also good, and shews that the sheep were in the defendant's close through his own neglect. If he had sent them back home, the general question would be raised.

COLERIDGE J. concurred.

Rule refused.

*Monday,  
April 23d.*

CATTIN v. SIMPSON.

The addition of a name as a second surety to a joint and several promissory note, after it has issued, but with consent of all the parties to it, is not a material alteration, so as to preclude the original surety, who has paid a moiety of it, from recovering the amount as money paid to the use of the maker.

**ASSUMPSIT** for money paid to the use of defendant. On the trial before *Patteson J.*, at the last York assizes, it appeared that the plaintiff and defendant had put their names to a joint and several promissory note, the plaintiff as surety, and the defendant as principal. After the note had been issued, a person of the name of *Laybourne*, with the consent of all the parties to the note, had lent his name to it as an additional surety. The plaintiff and *Laybourne* had each paid a moiety of the amount of the said note, and this action was brought to recover the moiety so paid by the plaintiff. For the defendant it was contended, that the subsequent addition of the third name to the note, after it had been issued, invalidated it altogether, so that the payment made by the plaintiff was a voluntary payment. The learned judge overruled the objection, and directed a verdict for the plaintiff.

*Cresswell* now moved for a rule nisi for a new trial, on the ground of misdirection. The addition of the third name to the note, which was already a perfect instrument, constituted a material alteration, so as to render an additional stamp necessary; *Clark v. Blackstock (a)*. The money therefore was paid by the plaintiff in his own wrong, and

(a) *Holt, N. P. 474.*

cannot be recovered back. The addition of the name made this substantial difference in the note, that the plaintiff and defendant could no longer be sued jointly on the note. Either *Laybourne* must have been joined with them, or each party have been sued separately. [*Littledale J.* This is not like a substantial alteration in the body of the note.]

Lord DENMAN C. J.—In the absence of any direct authority on the point, we think we are justified in saying that the third name had not the effect of any material alteration.

LITTLEDALE, PATTESON, and COLERIDGE Js. concurred.

Rule refused.

LEVY v. YATES.

**ASSUMPSIT.** The declaration stated that the plaintiff was proprietor of the Victoria Theatre, and that the defendant had agreed to open at that theatre with certain performers and a new piece for a month certain, with a power of renewal for another month, the defendant to have one clear half of each night's clear profits; that the defendant refused to open, &c., whereby the plaintiff lost great gains, &c.

**Plea:** That the said theatre is situate in the parish of St. Mary, Lambeth, in the county of Surrey, and within less than twenty miles, that is to say, within two miles of the cities of London and Westminster respectively, and not in the city of Westminster, nor within the liberties

Monday,  
April 23d.

Neither letters-patent from the crown, nor a licence from the Lord Chamberlain, can be granted for any dramatic performances, within 10 *Geo. 2*, c. 28, except in Westminster, or some place where her Majesty may be residing; and a sessions licence under 28 *Geo. 3*, c. 80, which

is the only other authority for such performances, cannot be granted for them, unless at a place not within twenty miles of London or Westminster. Dramatic performances therefore within twenty miles of London or Westminster, and not in Westminster or in the place of her Majesty's residence, cannot be rendered legal by any authority whatever, for the 28 *Geo. 2*, c. 36, extends only to music and dancing.

1838.

LEVY  
v.  
YATES.

thereof, nor in any place where his late Majesty or her present Majesty has resided, during any portion of the time during which such agreement was to be acted upon or to be in force. That neither plaintiff nor defendant, nor any other person or persons had been, nor were nor was, during such time as last aforesaid &c., in the year 1837, or any part thereof, or during any period of the said year, duly licensed or authorised, under or by virtue of letters-patent or otherwise from his or her said Majesty, or by licence from the Lord Chamberlain of his or her Majesty's household for the time being, nor by any other competent authority whatsoever, to act, represent or perform, for hire, gain or reward, any interlude, tragedy, comedy, play, farce, or other entertainment of the stage, or any part or parts therein, in or at the said theatre, as by law required; nor was the said theatre, during any part of the said year, duly licensed for such representations, performances or entertainments as aforesaid. That neither plaintiff nor defendant, nor any other person on their or either of their behalf, could nor would have procured such licence or authority as was and is by law required for such representations, performances and acting as aforesaid, during the whole or any part of the time aforesaid; nor did the plaintiff at any time tender, or offer to procure such licence or authority. And the defendant says, that the pieces, representations, parts and performances to be and intended to be acted, represented and performed, under and in pursuance of the said supposed agreement, were and would have been interludes, tragedies, comedies, operas, plays, farces or other entertainments of the stage, or some one or other of the same, for the acting, representing and performing whereof such licence or authority was and would have been, and is so required by law as aforesaid, and that the pieces in and by said supposed agreement mentioned were, and each of them was, such interludes or an interlude, tragedies or a tragedy, comedies or a comedy, operas or an opera, plays or a play, farces or a farce, or other entertainments or entertainment of the stage, or some one or

other of the same, and that the same were to be acted, represented and performed at the said theatre, during such time as aforesaid, for hire, gain and reward; of all which several premises the said defendant, before and at the time of the making of the said supposed agreement, to wit, &c., had notice. Verification.

Replication, *de injuriâ*.

On the trial before Lord *Denman* C.J., at the Middlesex sittings after last Hilary term, it was proved that the defendant's engagement related to the representation of certain comedies, melo-dramas, burlettas and other pieces, in which music, singing and dancing, were introduced. His lordship was of opinion that the plea was proved, and that a good defence was made out under the statute (a), and a verdict was found for the defendant.

(a) 10 *Geo. 2*, c. 38, s. 1, enacts, that every person who shall act or represent for gain or reward, any interlude, tragedy, comedy, opera, play, farce or other entertainment of the stage, such person not having any legal settlement in the place where the same shall be acted or represented, without authority by virtue of letters-patent from his Majesty, or without licence from the Lord Chamberlain, shall be deemed a rogue and vagabond.

Sect. 2. That any person, having or not having a legal settlement as aforesaid, who shall, without such authority or licence as aforesaid, act or represent &c., as aforesaid, shall for every such offence forfeit 50*l*.

Sect. 5 provides that no person shall be authorised by virtue of any letters-patent from his Majesty, or by the licence of the Lord Chamberlain, to act or represent as aforesaid, except in the city of Westminster, and within the liber-

ties thereof, and in such places where his Majesty, his heirs or successors, shall in their royal persons reside, and during such residence only.

The 25 *Geo. 2*, c. 36, s. 2, (made perpetual by 28 *Geo. 2*, c. 19,) enacts, that any house, room, garden or other place kept for public dancing, music, or other entertainments of the like kind, in the cities of London or Westminster, or within twenty miles thereof, without a licence had for that purpose, from the last preceding Michaelmas Quarter Sessions, shall be deemed disorderly.

The 28 *Geo. 3*, c. 30, (after reciting 10 *Geo. 2*, c. 28,) enables justices at general or quarter sessions, under certain restrictions, to license the performance of such tragedies, comedies, interludes, operas, plays or farces as are performed at either of the patent or licensed theatres in Westminster, so as the place of such perform-

1838.

LEVY  
v.

YATES.

1838.

LEVY  
v.  
YATES.

Sir *F. Pollock* now moved to enter judgment for the plaintiff *non obstante veredicto*. The question was raised at the trial, whether the performances, which form the subject of the agreement between the parties in this case, were of a nature to require either letters-patent or a licence, and it is now submitted, that the necessity for any such letters or licence does not sufficiently appear from the plea. In *Galini v. Laborie* (a) a contract to dance in ballets at the King's Theatre, in the Haymarket, was held to be within the 10 *Geo. 2*, c. 28; but in *Rex v. Handy* (b) Lord *Kenyon* said that, if in the former case he expressed an opinion that the above statute extended to every species of stage entertainment, he thought he was mistaken, and held accordingly that tumbling was not within the statute. A licence from the magistrates under 25 *Geo. 2*, c. 36, would have legalised the defendant's performances, and he does not in his plea deny that such a licence had been obtained. But even if the Lord Chamberlain's licence or letters-patent from the crown were indispensable, it was for the defendant himself, who was to be the active party in effectuating the agreement, to obtain the proper authority. The subject has been considered by the present Lord Chancellor in *Ewing v. Osbaldiston* (c), and his judgment is certainly opposed to the present claim, but it is desirable, notwithstanding, to have the decision of a Court of Law upon it.

Lord DENMAN C. J.—This question appears to us to be entirely free from difficulty. In the case before the Lord Chancellor, where the dramatic performances under consideration were exactly of the same character as in this case, he lays down most clearly, that such performances are within the 10 *Geo. 2*, c. 28, and “that there can be no letters-

ances be not within twenty miles of the cities of London or Westminster or Edinburgh, or eight miles of any patent or licensed theatre, or ten miles of the residence of his Majesty, his heirs or

successors, or of any place within the same jurisdiction.

(a) 5 T. R. 242.

(b) 6 T. R. 286.

(c) 2 Mylne & Craig, 53.

patent or licence from the Lord Chamberlain under the act of 10 *Geo.* 2, c. 28, or licence from the sessions under the 28 *Geo.* 3, c. 30, for the performance of any kind of theatrical representation, described in the act 10 *Geo.* 2, c. 28, within twenty miles of London, except in the city of Westminster, or in the place at which the king may be residing." The plea states facts, which shew most unequivocally that the agreement related to representations within the above acts, and which could not therefore be legalised in any way, for neither letters-patent, nor the Lord Chamberlain's licence, nor a licence from the sessions, could legally be granted for dramatic representations at this theatre, on account of its local situation and vicinity to the metropolis; and though its situation would not incapacitate it for a licence under 25 *Geo.* 2, c. 36, yet such a licence would be wholly unavailing, for that act is confined to music and dancing, and other entertainments of the like kind, and does not apply to dramatic representations.

1838.  
  
 LEVY  
 v.  
 YATES.

PATTERSON J.(a)—It is conceded that there was no licence or other authority in this case under the 10 *Geo.* 2, but it is said the plea does not negative a licence under the 25 *Geo.* 2. The question arises then as to the sufficiency of such last-mentioned licence. Now in *Ewing v. Osbaldeston*(b) it was expressly determined that such a licence would not protect dramatic performances. The plea therefore shews that, in consequence of the situation of the theatre, the performances in question could not be made legal in any way.

COLERIDGE J.—The plea is good. It discloses facts which bring this theatre within the restrictions of the 10 *Geo.* 2, c. 28. It is immaterial to consider whether it was the duty of the plaintiff or defendant to procure the licence,

(a) *Littledale J.* had left the Court.

(b) 2 *Mylne & Craig*, 53.

1838.

LEVY

v.

YATES.

as it could not legally have been procured by either of them, with a view of licensing the performances in question.

Rule refused.

Tuesday,  
April 24th.

DOE on the demise of NEALE v. JOHN SAMPLES.

Where a mortgagee proved his title under a conveyance in fee in 1821, a prior deed, above thirty years old, by which the estate in question was settled by the mortgagor on himself for life, remainder to his son, found among the papers of the mortgagor, after his death, is admissible in evidence without proof of execution.

The rule as to the proof of custody, which entitles ancient deeds to be so read, is satisfied by proof of their coming out of the possession of any one so connected with them as not to raise any suspicion of fraud.

**EJECTMENT** for a house and premises in Hartley Wintney, in the county of Southampton. At the trial at the last Winchester assizes, before Lord *Denman* C. J., it appeared that the lessor of the plaintiff claimed as mortgagee under deeds of lease and release executed in 1821 by the father of the defendant, who was nearly eighty years of age at the time, to secure a sum of money lent by the lessor of the plaintiff. On the death of the mortgagor in December, 1829, a marriage settlement was found among his papers, settling the property in question upon himself for life, remainder to the issue of the marriage about to be solemnized between himself and *Sarah Hunt*. The marriage settlement was dated 9th November, 1785, and it contained a proviso, that if the marriage did not take place within six months of the date thereof, the deed was to be void. It was proved that the marriage did take place on the 23d February, 1786. The trustees, and all the parties named in the deed, were long since dead. On the production of this deed, it was objected for the plaintiff, that it was inadmissible without regular proof, because it had not come out of the proper custody; but the Lord Chief Justice admitted the evidence, subject to a motion, and the verdict passed for the defendant.

*Erle* now moved to enter a verdict for the plaintiff. In order to make this deed admissible without proof, it should have come out of the proper custody, viz. the trustees or their representatives. The presumption in favour of ancient deeds does not apply, unless the custody from

which they are produced repels all suspicion of fraud. A passage in *Viner's Abridgment*, Evidence (A b. 5, pl. 7,) is generally referred to for the origin of the practice of receiving such deeds without regular proof, "for it is hard to prove ancient things, and the finding them in such a place is a presumption they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty." But in this case that presumption is rebutted by the fraud of *Samples* the father, and proof of execution of the deed should have been given. In 3 *Bac. Abr.* Evidence, p. 304, (7th ed.) it is laid down, if the deed imports a fraud, as when a man conveys a reversion to one, and afterwards conveys it to another, and the second purchaser proves his title, then the first deed must be proved, for the presumption of the antiquity of the deed is destroyed by an opposite presumption." For this position *Chattle v. Pound*, MS. is cited, and the same doctrine is laid down by the other text writers (a). In this case *Samples* the elder is proved to have conveyed in fee; if the deed of settlement is a genuine one, he was only tenant for life, and therefore must have committed a fraud; but as fraud is never to be presumed against any one, the deed ought to have been proved strictly. Again, if *Samples*, as tenant for life, did commit this fraud, his custody is the worst that can be conceived. If he wished to give this estate to his children, notwithstanding his mortgage, and was willing to commit fraud, the forgery of this deed would be the obvious course. In *Forbes v. Wale* (b) the danger was adverted to of allowing a deed produced out of the custody of a party benefited to prove itself, on the ground, that if the length of the date was alone sufficient to establish a deed, a knave has nothing to do, but to forge a bond with a very ancient date." Lord *Mansfield* C. J. in that case would not allow a bond thirty years old, on which nothing appeared to have been done, to be read against the obligor,

1838.  
  
 DOE  
 d.  
 NEALE  
 v.  
 SAMPLES.

(a) Bull. N. P. 255; 1 Stark. (b) 1 W. Bl. 532.  
 Ev. 331, 2nd ed.

1838.  
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 DOR
 d.
 NHALE
 v.
 SAMPLES.

without proof of execution. So, in this case, the only evidence against the lessor of the plaintiff is the settlement produced by the obligee.

LITLEDALE J.—It seems to me, on the whole, that, although the trustees were the proper persons from whose custody this deed should have come, in this case the custody was not so improper or improbable as to require proof of the execution of the deed.

PATTERSON J.—I am of the same opinion. No doubt such a deed as the deed in question is commonly in the possession of the trustees to the settlement. But the question is, whether the custody in this case was so manifestly improper and improbable, as to throw a slur on the authenticity of the deed. I have always understood that proper custody does not mean the custody of that person only who is by law entitled to the possession of the deed, but the custody of any person so connected with the deed, as that his possession of it does not excite any suspicion of fraud. One kind of custody may not be so strictly regular as another, and still be proper enough.

COLERIDGE J.—The rule, without doubt, as to proper custody is, that the law considers that to be satisfactory, in which, under the circumstances of the case, the deed may reasonably be supposed to have been kept. In *The Bishop of Meath v. Marquess of Winchester* (a), where a document relating to the bishopric was produced from the muniments of a descendant of a bishop, which clearly is not strictly the proper custody, it was held, on error in the House of Lords, that the custody was sufficient, and the document was held to have been rightly admitted.

Lord DENMAN C. J.—The simple question was, whe-

(a) 3 Bing. N. C. 183.

ther the custody of the marriage settlement by the tenant for life was sufficient, and I thought it was.

1838.

DOR

d.

NEALE

v.

SAMPLES.

Rule refused.

BAILEY v. APPLEYARD.

Wednesday,
April 25th.

REPLEVIN for taking the plaintiff's cow in a close called Lower Ing. Avowry, that the said close belonged to the defendant, and that the cow was taken damage feasant.

Pleas:—first, that plaintiff was the occupier of a certain messuage and land, and that the plaintiff and the occupier of the time being for *thirty years* next before the time when &c., and before the commencement of this suit, have continually had, and of right ought to have, a *right of pasture* in a certain close, called Toad Holes Lane, for his and their cattle, every year and at all times of the year, as to the said messuage and land appertaining. That the locus in quo was contiguous to the said lane, and that the cow, just before the time when &c., then lawfully feeding in Toad Holes Lane, escaped into the locus in quo, through defect of fences which defendant was bound to repair,

The second plea claimed for *twenty years* before the time when &c. and before the commencement of this suit, a right for the occupiers &c., every year and at all times of the year, to put and turn his and their cattle into and as to interrupt the enjoyment of pasture, and that afterwards, the rail having been removed, the plaintiff depastured for twenty-eight years:—Held, 1. That the defendant was not bound to prove that the rail was erected adversely to the plaintiff's right, but that the onus lay on the plaintiff to prove affirmatively his actual enjoyment of pasture for thirty years; and that no presumption could be admitted in his favour, on proof of enjoyment for a less period.

2. That proof of his enjoyment of pasture for twenty-eight years did not include proof of the right of turning on for twenty years, the latter right being an easement only, a right of quite a different nature, and of which no evidence was given.

3. Per *Littledale J.* A plea claiming for twenty years next before the commencement of the suit, a right for the occupiers of &c., every year and at all times of the year, to turn in cattle upon the locus in quo, without saying for what purpose, is demurrable.

1838.

BAILEY
v.

APPLEYARD.

upon the said lane, as to the said messuage and land appertaining: that the plaintiff's cow, just before &c., then lawfully being in and upon the said close, escaped &c., (as in the first plea).

The third plea differed from the second, in claiming the same right to turn in cattle for forty instead of twenty years.

The replications traversed the rights set up by the several pleas respectively.

At the trial before *Patteson J.* at the last York assizes, it appeared that the plaintiff and defendant occupied farms adjoining to each other, and to the lane in question; that the preceding occupiers of the plaintiff's farm had pastured their cattle in this lane at a period commencing rather more than thirty years before the commencement of this action. That in 1809 a stang or rail was put up, and afterwards removed, which, during its continuance there, interrupted the plaintiff in his enjoyment of pasture. It was objected for the defendant, that the right of pasture had not continued without interruption for a longer period than twenty-eight years: that the only evidence given was applicable to this right, which was a *profit à prendre*, and that it did not therefore support the pleas claiming a different kind of right, namely, of turning in cattle, which was merely an easement. For the plaintiff it was contended, that the erection of the stang had not been proved to be adverse, and that the depasturing before its erection and since, if added together, made out the right of pasture for the full period of thirty years; and that at all events the enjoyment of pasture for twenty-eight years established the other claim of turning in cattle, for which a twenty years' prescription was sufficient. The learned judge was of opinion that the defendant was not bound to prove that the erection of the stang was adverse, but that the plaintiff was bound, under 3 & 4 *Will. 4*, c. 71, (the Prescription Act) to prove affirmatively that he had depastured for thirty years, that he could not pray in aid any acts of depasturing before the interrup-

tion, and that there was no evidence at all of any other than a right of pasture. The jury, under the direction of his lordship, returned a verdict for the plaintiff on all the issues.

1838.


 BAILEY
v.

APPLEYARD.

Alexander now moved for a new trial, on the ground of misdirection. It was incumbent on the defendant to shew that the stang was erected adversely to the plaintiff's right, and the onus was thrown improperly upon the plaintiff to prove an uninterrupted enjoyment of his right. [Lord Denman J. C. We are all against you on this point.] As to those pleas, then, which claim the simple right of turning in cattle, it is submitted, though the third plea, which claims the right for forty years, must be given up, that the second plea, claiming for twenty years only, was proved. The evidence was certainly intended to support a more ample right—a right of pasture for thirty years; but, however insufficient for this object, it was applicable to, and maintained, the more limited right of turning in cattle, for twenty years only. [*Patteson* J. If the right of turning in means a right to depasture only, then it is a more limited right; if it be for any other purpose, then it is not.] In *The Bailiffs of Tewkesbury v. Bricknell*(a), it is laid down that a party may prescribe for less than he is entitled to claim. *Bushwood v. Pond*(b) is there cited, in which the prescription was for common for a hundred sheep; the evidence established a right of common for a hundred sheep and six cows, yet the prescription alleged was held to have been made out.

LORD DENMAN C. J. — I think no rule ought to be granted. Under the first issue there was no proof of enjoyment for thirty years, and actual enjoyment for this period must be proved under the first section of 2 & 8 Will. 4, c. 71. By the second plea a right is claimed of

(a) 1 Taunt. 142.

(b) Cro. Eliz. 722.

1838.


 BAILEY
 v.

APPLEYARD.

turning on cattle. This is not a very intelligible right in itself. It was necessary to give some evidence of the manner in which it had been exercised; and the only evidence given of the exercise of any right at all, was of a right of pasture, and the right of pasture was, beyond all doubt, negatived by interruption. It cannot therefore be said that more was proved than claimed by the plea; for the right of pasture, which is a *profit à prendre*, is a right of a different *character* from the right of turning in, which, if any thing at all, is an easement, and is provided for under a different section of the statute.

LITLEDALE J.—The first plea was certainly not proved. Under the old system, when enjoyment for time immemorial was required to substantiate a right of pasture, and of course could never be made out strictly, enjoyment for a period of twenty-eight years, which appears to have been had in this case, might have been sufficient for founding thereupon a presumption of the right. But the present claim is distinctly set up under the late Prescription Act. This act relieves a party from the necessity of proving his right from time immemorial, and allows, as an equivalent, the proof of actual enjoyment for thirty years, so that no presumption is admissible.

With regard to the second plea, which might have been demurred to as not shewing the purpose for which the cattle were to be turned on, the plaintiff, in order to succeed by proof of enjoyment for twenty years only, should have offered evidence of some right, not being of a *profit à prendre*, under the first section of the act, but a mere easement under the second, and of such acts of enjoyment as would tend to perfect his right to some definite easement. Now the evidence given did not apply in any way to the user of the lane, without reference to pasturage, and the sole object of the evidence was obviously to prove the right of pasture. It is not necessary to say any thing about the legality of such an easement as is claimed by the second

plea. Such an easement might perhaps exist for cattle on their way to some other place. But it is enough to say that there was no evidence in this case of any easement at all.

1838.

 BAILEY
 v.
 APPEYARD.

COLERIDGE J.—I think the ruling of the learned judge upon both points was correct. It appeared from the evidence in support of the right of pasture, that there was some enjoyment more than thirty years before the commencement of the action, then an exclusion occurred, and then the enjoyment was resumed, and continued for twenty-eight years. Now the 6th section of the Prescription Act expressly disallows any presumption in favour of a claim, upon proof of enjoyment for any less period of time than may be applicable under the act to the nature of the right claimed. Again, the 4th section provides, that each of the periods mentioned in the act shall be taken to be the period next before the commencement of some action bringing the claim into question; so that you cannot couple two detached periods together for the purpose of making out a prescription in its full complement. My brother *Littledale* has explained, that the statute substitutes positive proof of enjoyment during a limited number of years, for the immemorial enjoyment formerly alleged, and in aid of which, as it never could be proved throughout, presumption was admitted. The second plea must be taken to be framed on the second section of the act, which applies to easements, whereas the evidence related to a right of pasture only, a totally different thing. The section itself prescribes a different limitation of time with respect to easements, which shews that the subjects of the first and the other two pleas were considered to be of a different nature. It cannot therefore be said, that more was proved than had been claimed, when the two rights are specifically distinct, and the evidence in support of one of them was altogether inapplicable to the other.

1838.

BAILEY
v.
APPLEYARD.

PATTESON J.—Before the recent statute evidence in support of a right of pasture did not establish any other right, nor can it do so now.

Rule refused.

Wednesday,
April 25th.

THE QUEEN v. THE CAMBRIDGE GAS LIGHT COMPANY.

1. Where the mains and pipes of a gas company are distributed through several parishes, the proper criterion for the assessment of the Company to each parish is not the amount of receipts for gas supplied therein, but a proportional part of the rent at which, after deductions for the wear and tear of machinery, the works of the Company would let, calculated according to the improved value of the land, from the apparatus and works of the Company laid down therein.

UPON an appeal against a rate, by which the parish of St. Mary the Great, in the town of Cambridge, rated the Cambridge Gas Company in 70*l.* for and in respect of the mains and other pipes and apparatus belonging to the Company, situate and fixed in the ground in the parish, the sessions confirmed the rate, subject to the opinion of the Court upon a case, which stated, amongst other things, the following facts:—

The Cambridge Gas Light Company was incorporated by a local act, passed in the 4 *Will.* 4, conferring the usual powers, for lighting the various parishes in the town of Cambridge. In pursuance of this act, the Company purchased premises in the parish of St. Andrew the Less, within the town of Cambridge, and erected thereon a gasometer and other works necessary for making gas and coke, and broke up the soil and pavement in the public streets, and fixed proper mains and pipes along the streets, and into the several colleges, halls, shops, &c. of the University and town. They also manufactured for sale a considerable quantity of coke and tar, at their said works and premises in St. Andrew the Less.

The several colleges and halls in the University were all

2. The proper

deduction to be made from the rent of a Company's works, to form the basis of a poor rate assessment, is such an annual sum as will be sufficient to replace the works when worn out.

3. An assessment upon the above principles is not levied in any degree on the profits of the Company.

4. A gas company in the town of Cambridge, which consists of several parishes, in which are situated numerous colleges which are extra-parochial, supplied gas in mains and pipes to these colleges, and was rated therefore to the parishes in which the colleges are locally situated:—Held, that the rate was bad, the Company being rateable in respect, not of its receipts, but the land occupied.

founded prior to the 43 *Eliz.* (1601), excepting Downing College, which was founded in 1800, and (with the exception of Downing College and of some modern additions to others) no college or hall in the University is, or ever has been, rated to the relief of the poor. The various parishes however in which the colleges and halls are locally situate, in perambulating their respective boundaries, have been accustomed to go into and pass through the colleges and halls, and to affix their boundary marks therein. Several of the colleges and halls are lighted by the Company with gas, which is supplied from their works by the mains and pipes fixed in the ground, and which pass into and through various parishes as aforesaid, and amongst others into and through the parish of St. Mary the Great.

The lands, buildings, gasometers, retorts, and other works and apparatus for making gas, coke and tar, together with the mains and pipes for conveying gas through the town, colleges and halls, would let to a responsible tenant for 2400*l.* a year, the tenant paying all rents and outgoings for making the subject of occupation productive, and doing all the ordinary repairs required, but not providing for the renewal of the various works when necessary, which renovation would cost upon an average 500*l.* a year; viz.—

For the buildings and main pipes 300 0 0

For the gasometers and other more perish-

able articles 200 0 0

£500 0 0

The rent of 2400*l.* also includes the mains, pipes and apparatus in those colleges and halls which are not assessed to the relief of the poor, the value of which mains, pipes and apparatus, so included, is 350*l.* a year. The gas consumed in the parish of St. Mary the Great is conveyed into and through it by mains and service pipes sunk and affixed in the soil. The sum received by the Company for gas thus conveyed and consumed by the parish is 76*l.* 18*s.* 8*d.* per annum.

1838.


The QUEEN
v.
CAMBRIDGE
GAS LIGHT
COMPANY.

1838.

The QUEEN
v.
CAMBRIDGE
GAS LIGHT
COMPANY.

The assessment in St. Mary the Great has been confirmed, upon the assumption that 2400*l.* is the sum at which the works, mains, pipes and apparatus of the Company is liable at law to be rated to the relief of the poor, and that this sum, after deducting 150*l.* for the value of the buildings and works at the manufactory, ought to be distributed amongst the different parishes through which the mains and pipes are laid, with reference to the annual receipts by the Company for gas supplied in each parish respectively. If this be correct, it is admitted that 70*l.* is a proper assessment to be made by St. Mary the Great.

The Company contended that, assuming the annual rent to be the proper criterion of annual value for the purpose of rating, the following deductions should be made:—

For the cost of renovation of the various works	500	0	0
For the annual value of the mains, &c. within the colleges not rated to the poor	350	0	0
For the profits in trade of the Company .	600	0	0
	<u>£1450</u>	<u>0</u>	<u>0</u>

The Company, however, contended that the rent at which the works would let is not the proper criterion of value, but that they should be rated at the actual productive value, to be calculated on the balance of their total receipts and expenditure, viz. on 2370*l.* 2*s.*,—deducting therefrom the following items:—

For renovation of works, &c.	500	0	0
Bad debts	50	0	0
Law expenses	25	0	0
For interest at 5 per cent. on a capital of 3000 <i>l.</i> , necessarily employed in the Company's manufacture or works . .	150	0	0
Allowance of 20 per cent. for profits in trade	600	0	0
Gross receipt for gas supplied to the col- leges and halls	814	17	4
	<u>£2139</u>	<u>17</u>	<u>4</u>

Personal estate or the profits of trade are not assessed to the poor rate in any parish within the town of Cambridge.

The questions for the opinion of the Court were, which of the two principles of assessment was the correct one, and what deductions ought to be made in either case? Secondly, the total rateable value being ascertained, upon what principle it ought to be distributed amongst the several parishes through which the mains and pipes were laid, after deducting 150*l.* for the value of the buildings and works in the parish of St. Andrew the Less? If the Court shall be of opinion that the assessment was made upon the correct principle, and that the Company is not entitled to make any deduction, the order of sessions to be confirmed; if the Court shall decide otherwise, the rate to be adjusted accordingly.

Kelly and Bodkin, in Hilary term last(a), in support of the order of sessions. The principle, on which it is contended a gas company should be rated, is the annual rent at which their works and pipes would let. This principle is established by the decisions in *Rex v. The Birmingham Gas Company* (b) and *Rex v. The Brighton Gas Company* (c). In *Rex v. Chaplin* (d), where the rating of a canal navigation was in question, the amount at which it would let was held by all the Court to be the proper criterion of annual value. If the principle proposed by the Company were to be adopted, the difficulties in the way of the different parishes of Cambridge would be almost insuperable, whereas no difficulty presents itself in taking the gross rent, and then in ascertaining the annual receipts for gas supplied by the Company from each parish respectively. The ground on which the Company rely in claim-

1838.

The QUEEN
v.
CAMBRIDGE
GAS LIGHT
COMPANY.

(a) Jan. 20th, before Lord Denman C. J., Littledale, Williams, and Coleridge Js.

(b) 1 B. & C. 506; S. C. 2 D.

& R. 735.

(c) 5 B. & C. 466; S. C. 8 D. & R. 308.

(d) 1 B. & Ad. 926.

1838.


 The QUEEN
 v.
 CAMBRIDGE
 GAS LIGHT
 COMPANY.

ing deductions, is the language of the Court in *Rex v. Lower Milton* (a). *Bayley J.* held there, that the annual value at which a canal company should be rated "would be properly estimated at the rent which a tenant would give, he paying the poor rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive; and a further deduction should be allowed from that rent where the subject is of a perishable nature, towards the expense of renewing or reproducing it." It is submitted this is not the principle. No case can be found in which any such deductions have been allowed. If they are to be made with respect to every subject-matter liable to decay, they must be made in every case, for even land itself requires a continual outlay of capital in manure &c. to make it productive. [*Littledale J.* In such cases the tenant always takes into consideration the sum to be laid out annually, and gives less rent accordingly. *Coleridge J.* A difference is made in some of the cases between houses and land, establishing that a deduction should be allowed towards a fund for rebuilding the former.] In *Rex v. Tomlinson* (b), where the sessions made a distinction in the rate on houses and lands, the Court only held that they would not interfere with the assessment. A deduction here is claimed for gasometers &c., which may last 100 years. The second deduction claimed is for the mains &c. running into the colleges; but it is not stated that they are extra-parochial: the contrary would rather appear to be the case. The reason perhaps of their not being rated to the poor, was from their being considered, at the time of passing 43 *Eliz.*, as religious institutions. The third deduction is claimed in respect of the profits of lands, which have not been attempted to be rated. The only remaining question is, whether the assessment of 70*l.*, which is calculated on the profits made by the Company

(a) 9 B. & C. 810; S. C. 4
 Mann. & Ry. 711.

(b) 4 Mann. & Ry. 169; S. C.
 9 B. & C. 163.

in the particular parish, is properly made. *Rex v. Kingswinford* (a) shews this is the correct mode.

1838.

 The QUEEN
 v.
 CAMBRIDGE
 GAS LIGHT
 COMPANY.

Sir *W. W. Follett* and *Byles* contra. The two cases referred to, *Rex v. Birmingham Gas Company* (b) and *Rex v. Brighton Gas Company* (c), to shew that rent is the proper criterion of annual value, only prove that the pipes and mains of a gas company are rateable property. A different question arises as to the principle on which this sort of property is rateable. Rent may often be an excellent criterion, but it is not the only one. In some cases it may be too high, in others too low. If the premises and works of the Company were situated in one parish the rent might be the best criterion, but when they are distributed in different parishes nothing can be more incorrect. The parish however has not adhered to one principle, for even if 2400*l.* be a proper sum to take for the whole, how is the sum of 70*l.* arrived at in the particular parish? Clearly by a different calculation: viz. on the receipts for the gas consumed there. Suppose that no gas were consumed in that parish, but that the mains for the supply of the whole town went through the parish, the principle could not be applied, and yet it is clear that the parish in that case would be rateable; *Rex v. Corporation of Bath* (d), *Rex v. The New River Company* (e). Even if they were right in taking the rent as the principle, they have not made the proper deductions; for in order to obtain a rent of 2400*l.*, an expenditure of 500*l.* a year is required. Both *Rex v. Tomlinson* (f) and *Rex v. Lower Mitton* (g) establish that, when rent arises out of perishable subject-matter, a deduction should be allowed as a fund for replacing it. *Rex v. The Duke of Bridgewater's*

(a) 7 B. & C. 236; S. C. 1 Mann. & Ry. 20. See Gunning on Tolls, 207.

(b) 1 B. & C. 506; S. C. 2 D. & R. 735.

(c) 5 B. & C. 466; S. C. 8 D. & R. 308.

(d) 14 East, 609.

(e) 1 M. & S. 503.

(f) 4 Mann. & Ry. 169; S. C. 9 B. & C. 163.

(g) 9 B. & C. 810; S. C. 4 Mann. & Ry. 711.

1838.

THE QUEEN
v.
CAMBRIDGE
GAS LIGHT
COMPANY.

Trustees (a) establishes the same principle, and if any additional authority were wanting, it would be found in the recent statute 6 & 7 Will. 4, c. 96, s. 1, which enacts that the assessment shall be made on an estimate of the rent at which the property may reasonably be expected to let, free from all usual tenant's rates and taxes, and deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. A deduction should also be made for the profits of trade, *Rex v. Woking* (b), *Rex v. Joddrell* (c). The rate also is made on the gasometer, which alone is sufficient to make the rate bad, for the case finds that the fixed property in breweries, &c. is not rated. The rate is also bad from being made on the mains within the colleges, which are not rated. There can be no doubt on the case that the colleges are extra-parochial. On all these grounds, whatever principle of assessment be adopted, the deductions claimed by the Company ought to be allowed.

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court:—This was an appeal against a rate made for the relief of the poor of the parish of St. Mary the Great, in the town of Cambridge. The sessions confirmed the rate, subject to the opinion of this Court upon a case, stating that the said Company, by virtue of an act of parliament containing the usual powers, had erected a gasometer and other apparatus in the parish of St. Andrew the Less, in the said town of Cambridge, and had also laid down mains and pipes through the various parishes, and also colleges and halls, (which, upon the statement, we consider to be extra-parochial,) including the said parish of St. Mary the Great, and thereby supplied the public and private buildings in the said town with gas. The Company has been assessed in the latter parish in the sum of 70*l*,

(a) 9 B. & C. 68; S. C. 4 Mann.
& Ry. 143.

(b) 4 A. & E. 40; S. C. 5 N. & M. 395.

(c) 1 B. & Ad. 403.

upon the amount of 2400*l.*, which is stated to be what a responsible tenant would give for the whole apparatus for a year, after making some deductions, and disallowing others, hereafter to be noticed. Upon hearing of the appeal two questions mainly arose :—1st, whether the above principle of ascertaining the sums to be assessed be correct, or whether it ought to have been made upon the total receipts of the Company, deducting their expenditure ; and 2nd, whether due allowance has been made of all proper deductions, supposing the first principle to be correct.

That the general principle adopted by the parish officers, and confirmed by the sessions, as contrasted with that contended for by the appellants, is correct, we consider it to be now too late to doubt. The decisions of *Rex v. Trustees of the Duke of Bridgwater* (a), of *Rex v. Tomlinson* (b), and of *Rex v. Lower Milton* (c), have, we think, settled the question. The former case is an express authority against the appellants, and the latter in favour of the decision of the sessions upon this point. We are of opinion, therefore, that the sessions were quite right in the adoption of the general principle, but not equally so in *allowing* the deductions which ought to be made. These were claimed by the Company, first, for the renewal of the works 500*l.* ; secondly, for the value of the mains and pipes within the colleges and halls 350*l.* ; and thirdly, for the profits in trade of the Company 600*l.*

As to the first, the rule laid down in the case of *Rex v. Lower Milton* (c) before mentioned is, we think, in point. Amongst other deductions there mentioned which ought to be made from that rent, which is to be the criterion for ascertaining the proper amount of the rate, there is specified, “ a further deduction which ought to be allowed when the subject is of a perishable nature, towards the expense of renewing or re-producing it.” It was observed at the bar, that, until the case of *Rex v. Lower Milton* (c) this

1838.

 The QUEEN
 &
 CAMBRIDGE
 GAS LIGHT
 COMPANY.

(a) 9 B. & C. 68 ; S. C. 4 Mann. & Ry. 169.
 Mann. & Ry. 711.

(c) 9 B. & C. 810 ; S. C. 5 N. &

(b) 9 B. & C. 163 ; S. C. 4 M. 395.

1838.

The QUEEN
v.
CAMBRIDGE
GAS LIGHT
COMPANY.

doctrine is not to be found. The Court, however, in their judgment, for which time was taken, referred to other cases as the foundation of it; and the reasonableness of allowing such a deduction is, we think, obvious, because the estimated rent, at the supposed time of letting, manifestly could not be continued at the same amount unless the apparatus be maintained in as good a state and condition. And this view of the subject receives confirmation, if it had been requisite, from the recent statute 6 & 7 Will. 4, c. 96, s. 1, which prescribes the manner in which property shall thereafter be assessed. The language there used in describing one of the deductions to be allowed, is almost in terms the same as that employed by the Court in the last-mentioned case.

The second ground of deduction may be more conveniently considered hereafter. The third claim of deduction is "for the profits in trade of the Company 600*l*." This claim, it is presumed, has arisen from the fact stated, that profits in trade are not assessed in any parish in the town of Cambridge, nor are they in this instance. The rent which it is found a tenant would give by the year, after certain deductions, (*viz.* 2400*l*.) is not the amount of *profits*. Those necessarily are something independent of and beyond the rent, upon which the person taking the apparatus must calculate, or nobody would become tenant at all; they are therefore perfectly distinct. The rent which a tenant would give for land after certain deductions, which is the criterion for the due assessment of it, is one outgoing, the expense of cultivation another, and all beyond, whatever that may be, obviously comes under the denomination of profits. Since, therefore, the profits are in their nature wholly distinct from the rent, and are not only not a deduction from it but the reverse—something beyond and in addition to it—we cannot perceive that this claim rests upon any just principle, and are of opinion that it has been properly disallowed.

We come now to the fourth question, upon what principle the total rateable value, being ascertained, ought to be dis-

tributed amongst the parishes in and through which the mains and pipes are laid, after deducting 150*l.* for the value of the buildings and works in the parish of St. Andrew the Less; and it is one of considerable general importance. The sessions have adopted as their criterion the amount of the receipts for gas supplied in each parish, and have assigned to the respondent parish the sum of 753*l.* 18*s.* 8*d.*, being such amount within it; and if the principle be correct it is admitted that 70*l.* is the proper assessment upon the Company in that parish. In determining this point it is necessary to consider *in respect of what* the Company is rateable according to the decisions. And from the case of *Rex v. Corporation of Bath*(a), and various other authorities in conformity thereto, including *Rex v. Brighton Gas Company*(b), and the still later case of *Rex v. Trustees of Duke of Bridgwater*(c), and many others which might be cited, it appears that they are rateable as occupiers of lands "for the improved value of the land from the gas pipes being laid in it." This therefore being, as we think it is, the acknowledged principle, it seems to follow that the criterion before mentioned, which has been adopted by the sessions, cannot be the true one. Suppose (adopting their own rule) the value of the whole works to be 2400*l.* per annum, minus certain deductions, and the quantity of apparatus in the soil of each of the several parishes to be equal, but the sale of gas and the receipts for it to be confined to one, the cases of *Rex v. Corporation of Bath* before referred to, and *Rex v. New River Company*(d), and *Rex v. Foleshill*(e), are express authorities to shew that a rate upon the Company in that particular parish, where all the profits are received, could not be sustained. The New River Company was rated in the parish of Little Amwell at the sum of 300*l.*, the value of the land independent of the water being 5*l.* only; and this Court held the rate to be proper,

(a) 14 East, 629.

(b) 5 B. & C. 466.

(c) 9 B. & C. 68.

(d) 1 M. & Selw. 503.

(e) 2 Ad. & Ell. 593.

1838.

The QUEEN
v.
CAMBRIDGE
GAS LIGHT
COMPANY.

1838.


 The QUEEN
 v.
 CAMBRIDGE
 GAS LIGHT
 COMPANY.

though it was expressly stated that *no part of the profits accrued in the parish of Little Amwell*,—nor, indeed, until the distribution of the water in London. Since, therefore, in the present case the land occupied by the apparatus in each parish through which it passes contributes to the whole value to let, it follows that the Company must be rated in respect of its occupation in each parish; and if so, we are aware of no rule which can be laid down as to the amount, except that it must be in proportion to the quantity of apparatus situate in each parish. It is true that in the case of a canal where the tolls varied in different parts of the line, it was decided that a rate could not be made upon the Company in each parish according to the length of the canal in it, and *for that reason*; *Rex v. Kingwinford* (a). But in a case very recently before this Court, where the tolls were the same throughout the whole line, it was held that the proportion to be paid by the Company in any given parish along the line must be ascertained by a mileage calculation, *Rex v. Woking* (b). And as it is impossible to suppose any superiority in one part of the apparatus over another, the same principle, we think, should be applied in the present instance, and that the assessment upon the amount of profits received in the respondent parish was wrong.

It remains only to consider whether the deduction of 350*l.*, being the annual value of that part of the apparatus, which lies within the colleges and halls, ought to be made. And we purposely reserved the consideration of this point to the last, because it is connected with the principle which regulated our answer to the last question. For inasmuch as the rate is imposed upon the land used for the apparatus, and as none can be imposed upon that part which lies in those extra-parochial places, the amount which would otherwise have arisen therefrom (the aforesaid sum of 350*l.*) must, we think, be deducted. Upon the whole, therefore,

(a) 7 B. & C. 236.

(b) 4 Ad. & Ell. 41.

in those particulars as to which the sums are agreed upon, the amendment of the rate will be, of course; but as we have no materials for ascertaining the proportion between the parishes, it must (as according to the statement was intended) in that respect be "adjusted."

1838.

THE QUEEN
 v.
CAMBRIDGE
GAS LIGHT
COMPANY.

Rate to be sent back to Sessions to be adjusted.

**The QUEEN v. The Mayor, Sheriffs, Citizens and
 Commonalty of the City of LINCOLN.**

*Thursday,
 April 26th.*

THE indictment against the defendants stated in the first count, that from time immemorial there had been a public bridge, called Great Bar Gate Bridge, over a certain water-course, called Great Bar Gate Drain, in the parish of St. Botolph, in the city of Lincoln, in a common ancient king's highway, leading from &c. over the said bridge, used for all the liege subjects &c., and that a certain part of the said highway next adjoining the north end of the said public bridge, within the distance of 300 feet thereof, beginning at the north end of the said bridge, and certain other parts of the said highway adjoining the south end (described in like manner), were out of repair, and that the said defendants the said bridge have immemorially been bound to repair, and still of right ought to repair, as often as required, yet that they refuse to repair the said parts of the said highway, so as aforesaid in decay. The second count was similar; but alleged that the defendants were a prescriptive corporation. The third count charged that the defendants were immemorially bound to repair the parts of the highway adjoining the bridge; and the fourth count was similar, but alleging, as in the second count, that the defendants were a prescriptive corporation. Plea; not guilty. At the trial before *Park J.*, at the summer assizes, 1834, for the county of Lincoln, a verdict passed for the

Where there is a prescriptive liability to repair a bridge, it is an intendment of law, in the absence of any evidence to the contrary, that the liability extends to 300 feet of the approaches at each end of the bridge.

1838.

The QUEEN
v.
Mayor &c. of
LINCOLN.


crown, subject to the opinion of the Court on the following case.

The defendants are the corporation of the city of Lincoln, which is an immemorial corporation. The city of Lincoln is a county of itself, and not comprised in any other county. The bridge, the Great Bar Gate Bridge, mentioned in the indictment, is an ancient public bridge, and the said corporation have from time immemorial exclusively repaired the fabric of the said bridge, and are liable by prescription to repair it. The fabric of the bridge is not out of repair; but there is a public highway passing over the said bridge; and the said highway extending from the said bridge from each end of it for more than 100 yards both ways, within the city and county of the city of Lincoln, is out of repair, which is the highway mentioned in the indictment. There was no evidence that any part of the said highway had ever been repaired by the defendants or their predecessors, or by the parish in which it is situated; but the whole of the said highway, including the part of it which passes over the said bridge, has, as far back as the memory of living witnesses can go, been repaired by the Commissioners for the south-east and south-west district of the Lincoln turnpike road, which commissioners were first appointed by a public act of parliament, passed in the 29th year of the reign of his late majesty King *George* the Second. The question for the opinion of the Court of King's Bench is, whether defendants were liable to repair the said part of the said highway so out of repair. If defendants are so liable, then the verdict for the crown to stand; otherwise, a verdict of not guilty to be entered.

Balguay argued the case for the crown, in Hilary term last (a). The liability of the defendants to repair the bridge being admitted, their liability also to repair 100 yards of the highway at each end of the bridge follows as a

(a) Jan. 17th, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

matter of course: *Rex v. The West Riding of Yorkshire* (a), Lord Coke's comment on the Statute of Bridges (b), *The Abbot of Combe's* case (c). In that case a jury had found that the Abbot was not bound to repair except two arches of the bridge of T. and the bridge *ultrà cursum aquæ*, and not the ends of the bridge; but *Knivet J.* held, that he was bound to repair the bridge and the highway adjoining the one end of it and the other. Lord *Eldon C. J.* remarked upon this case, in *The West Riding of Yorkshire v. The King* (d), that it was hard doctrine; but he acted upon it. [*Littledale J.* It is difficult to understand that case. Probably the doctrine laid down only fell from a serjeant *arguendo* (e).] The only difficulty in the case does not apply here, because the corporation are found to be liable to repair the whole bridge.

1838.

 The QUEEN
 v.
 Mayor &c. of
 LINCOLN.

Sir *F. Pollock*, *contra*. It is admitted that where there is a liability at common law to repair a bridge, the liability to repair the approaches, to the extent defined by the statute 22 *Hen. 8*, c. 5, s. 9, follows. But a liability by prescription is founded on a private agreement, and no other burden is created by it than what the grantor has voluntarily imposed upon himself. It is found here ex-

(a) 7 *East*, 588, confirmed in error, 5 *Taunt.* 284; *S.C.* 2 *Dow*, 1.

(b) 2 *Inst.* 705. See also 13 *Rep.* 33.

(c) 43 *Assis. pl.* 37; *Bro. Abr. Presentments in Courtes*, 22 & 29, fo. 152; *Fitz. Just.* 186.

(d) 5 *Taunt.* 284.

(e) The decision in the Year Book appears to depend on the necessity for a special plea, shewing who is liable to do the remainder of the repairs. For although when a private person is indicted for not repairing, he may prove that another ought to repair, under a plea of not guilty, yet as the Abbot, by his plea, acknowledged his liabi-

lity to repair part, he ought to have shewn in his plea who was liable to repair the remainder; according to the doctrine in *The King v. Gorton*, 1 *Sid.* 140; *S. C.* *Kebl.* 498; and *Rex v. St. Andrew's, Holborn*, 3 *Salk.* 183, 8; *S. C.* 1 *Mod.* 112; and this seems to be the reason pointed out by *Knivet J.*, "as it is not found nor limited in the record who ought to repair the remainder of the bridge, and without doing that it would be of no virtue, although it may be found that the arches are in good repair, still that cannot be held an argument for you." See also *Poph.* 192.

1838.

The QUEEN
v.
Mayor &c. of
LINCOLN.

pressly that the corporation are liable by prescription to repair the fabric of the bridge, but as *expressio unius est exclusio ulterius*, that is equivalent to finding that they are not liable to repair the approaches. With regard to the *Abbot of Combe's* case (a), it contains most extraordinary doctrine; for what is there to prevent a party being liable by prescription to repair one arch of a bridge, and how can that prescriptive liability throw upon him the burthen of the whole? The only authority of the case arises from its having been noticed by Lord *Eldon* and the Court below, in *Rex v. The West Riding of Yorkshire* (b). But it was no authority even for the decision in that case, which was one of common law liability; whereas the Abbot was only liable by prescription, so that there was no analogy. As a prescription therefore is founded on a grant, and the extent of it is to be determined only by the evidence, and as the jury have found that the corporation are only liable to repair the fabric of the bridge, the Court cannot throw any other liability upon them. The Court in fact are required to find that a party who has covenanted to do one thing only, is also bound to do another.

Balguay, in reply. If the corporation are not liable to repair the approaches, no one is liable; for it is found that the parish has never repaired. [*Patteson J.* On an indictment for not repairing a bridge, it would not do to give evidence of the state of the approaches (c), but you must charge the non-repair of both, which shews that there is a distinction. *Coleridge J.* The 5th section of the Statute of Bridges applies to liability by prescription as well as to common law liability; and then sect. 9, which requires both ends, to the extent of 300 feet, to be repaired, would appear to apply to both also. *Littledale J.* The reading of that section has been, that by common law the county is bound to repair bridges and some part of the approaches

(a) 43 Assis. pl. 37.

(b) 7 East, 588; 5 Taunt. 284.

(c) See the precedents, for the

non-repair of the approaches of a
bridge, 7 East, 588; 2 Chitt. Crim.
L. 601.

to them, and that the statute defines how much of those approaches the county ought to repair (*a*); but that does not appear to touch a prescriptive liability.] There is no such distinction as has been drawn between prescriptive and common law liability. The county is liable to repair bridges, if no one else is. When the county is liable to repair the bridge, it must also repair 300 feet at each end, according to the statute; but if any one by prescription is put in the place of the county, he is bound to the burden with all its accessories; and sect. 9 applies quite as much to him as to the county; the principle in both cases being, that as the public is entitled to an easement, they are entitled to all that is necessary for its enjoyment.

1838.

 The QUEEN
 v.
 Mayor &c. of
 LINCOLN.

Cur. adv. vult.

Lord DENMAN C.J. on this day delivered the judgment of the Court.

This is a case of indictment for the non-repair of certain portions of the common highway, to which the defendants have pleaded not guilty. A verdict for the crown has passed by consent, subject to our opinion upon a special case, which raises this question,—whether a prescriptive liability to the repair of a public bridge, in the absence of any evidence to the contrary, and by itself, includes a liability to repair the highways at the ends of it within the distance of 300 feet. The prescriptive liability to repair the bridge is not contested on the one hand; and it is found on the other, that there is no evidence of any actual repair done to the highways at the ends of it, by the defendants or their predecessors, within living memory. The only repairs proved have been done by a body of turnpike commissioners, created by act of parliament, 29 Geo. 2.

Since the case of *The King v. West Riding of Yorkshire* (*b*), it has been considered settled, that, where the liability to repair a bridge attaches by the general law,

(*a*) See *Rex v. The West Riding of Yorkshire*, 2 East, 342.

(*b*) 7 East, 588, and 5 Taunt. 284.

1838.

 The QUEEN
 v.
 Mayor &c. of
 LINCOLN.

as declared by the Statute of Bridges, the liability to repair the approaches to the bridge, for the space of 300 feet, follows the same rule. It is contended, however, that a prescriptive liability is independent of the common law, and must in each case be measured by its own exact limits, which in the present instance are confined to the bridge itself. We think that the proposition of law is here correctly laid down, but that the facts found in the present case do not warrant the conclusion drawn from it. Nothing appears here by which the liability to repair the approaches, *as parcel* of the prescriptive liability to repair the bridge itself, is excluded; there is no evidence of any conflicting liability. The non-repair by the parish or the inhabitants of the county, and the non-repair *de facto* by the defendants, when explained by the repairs having been done for a great number of years by a body created by a modern act of parliament, are both consistent with a prescriptive charge *de jure* having been, all the time, existing and binding on the defendants. The jury therefore, if this issue had gone to them for a decision, would have been properly directed to draw all such inferences in fact from the admitted liability to repair the bridge, as that liability, unexplained and unrestricted, contains by intendment of law within itself.

The question then returns, what, by intendment of law, is the extent of a prescriptive liability to repair a bridge; does it include the approaches or not? The dictum of *Knivet J.*, in the *Abbot of Combe's* case (*a*), answers this question, if it be law. There, to an indictment for the non-repair of a bridge, the Abbot had pleaded that he was only bound to repair two arches of it, and the jury had found that he was bound only to the repair of two arches, and the bridge over the stream of the water, *et non fines ejusdem pontis*. This was pleaded by him to a second indictment, and the record read; yet *Knivet J.* said, "We intend that you are bound to repair the bridge and the highway applying to the one end and to

(*a*) 43 Assis. pl. 37.

the other, although the soil be in another, because the easement shall be preserved for the people." This is a strong case, because the jury had negatived the liability to repair any more than the bridge; but they had not then ascertained any other person or body to be liable: it was a case therefore like the present, of a prescriptive charge to repair a bridge, unexplained and unrestricted in fact; and the judges considered that the charge to repair the approaches was legally parcel of such a prescription. This case was mainly relied on in the judgment of this Court in the case first mentioned (a), as shewing that so early as the reign of *Edward 3*, the judges understood the approaches to the bridge to be, as it were, excrescences of the bridge itself, and that the charge of repairing them was considered as "belonging *primâ facie* to the party charged with the repair of the bridge." In the House of Lords also, in the argument on the same case in error, this dictum was again relied on; and Lord *Eldon*, though he called it "*hard doctrine*," yet expressed no dissatisfaction with it as a lawyer, and assigned a satisfactory legal reason for it (b). It would be difficult for us therefore to say that this case, so recognized, is not law; and being a case of prescription, it is certainly more directly applicable to the present case than it was to that of *The King v. The West Riding of Yorkshire* (a), which was a case of common law liability. But, independently of authority, we think it maintainable on principle; the same principle which has united the approaches of the bridge itself, in the case of a common law liability, namely, that of rendering complete the benefit to the public from the repair of the bridge itself. It is, besides, repugnant to the genius of law to multiply distinctions unnecessarily, and much more convenient and reasonable to hold that the same general rule should prevail, whoever may be charged with the repair of the bridge itself.

We do not therefore break in upon the well-established

1838.

The QUEEN
v.
Mayor &c. of
LINCOLN.

(a) *Rex v. The West Riding of Yorkshire*, 7 East, 598. (b) 5 Taunt. 299.

1838.

The QUEEN
v.
Mayor &c. of
LINCOLN.

rules of law as to the extent of prescriptive liabilities, but lay down this only, that in the absence of any evidence to the contrary, the prescription to repair the bridge must be intended to include within it the repair of the approaches to it. The verdict for the crown therefore will stand.

Verdict for the crown.

Friday
April 27th.

The QUEEN v. The Mayor, Aldermen, and Burgesses of
LIVERPOOL.

The corporation of Liverpool, in compliance with certain local acts, built a church and appointed a person to officiate therein by the name of minister. They also of their own accord, and independently of these acts, appointed a clergyman as "lecturer," to assist him in the general duties of his office. The lecturer having been removed, after receiving a regular stipend for more than seven years before the passing of the 5 & 6 Will. 4, c. 76, claimed compensation for the loss as his office as

SIR W. W. FOLLETT, in Hilary term 1837, obtained a rule calling upon the mayor, aldermen, and burgesses of the borough of Liverpool, to shew cause why a mandamus should not issue, commanding them to secure to the Rev. *Thomas Moss*, by bond under their corporate seal, the yearly sum of 180*l.*, being the stipend, which for seven years next before the 5th of June, 1835, had been usually paid to him as minister or lecturer of the church of St. John, Liverpool.

By virtue of 2 *Geo. 3*, c. lxxviii. (local), intituled "An Act for building two new Churches and providing burial places within the town of Liverpool," &c., two new churches, called St. Paul's and St. John's, were built within the town. The right of presentation and perpetual advowson and patronage in these churches was, by the same act, vested in the corporation of Liverpool, who were also authorized and required, by sect. 34, to appoint a proper person "to be the *minister and ministers* of each of the said churches, and to pay him a yearly stipend; and also in like manner to nominate and appoint a minister to and for each of the said churches on every vacancy and avoidance thereof respectively," who should be licensed by, and subject to the ordinary jurisdiction of the Bishop of Chester.

The affidavits, upon which the rule was obtained, stated "minister," under sect. 68.—Held, that the word "minister" was to be interpreted liberally, and without reference to the way in which it was used in the local acts, and that the claimant was intitled to compensation.

that, ever since the first appointment in 1784 of minister to St. John's church, under this act, the corporation had invariably appointed a lecturer also, with a yearly stipend, who had been regularly presented to and licensed by the bishop. The affidavits then set out the following appointments by the corporation: "At a common council held on the first day of February, 1815, they elected, nominated, and appointed the Rev. *Richard Loxham*, clerk, to be minister of the church of St. John, in this town, in the place of the Rev. *Henry Dennett*, deceased. They also elected, nominated, and appointed the Rev. *Thomas Moss*, clerk, to be lecturer of the said church of St. John, in the place of Mr. *Loxham*, appointed minister, with the like stipend of 120*l.* as was heretofore paid to Mr. *Loxham*." It was then stated, that, in pursuance of this resolution, Mr. *Moss* had been duly presented and licensed, and had regularly performed his duties as lecturer, which were the same as those of the minister in all respects, except that the minister usually attended himself to the churchings, weddings, baptisms and funerals. That in 1816 the stipend of the lecturer was increased to 180*l.*, which had been regularly paid to Mr. *Moss* up to December 1835, when the common council or governing body of the corporation went out of office, according to the provisions of the Municipal Corporation Act (5 & 6 Will. 4, c. 76). That Mr. *Moss* had called upon the defendants to execute a bond securing compensation to him for his loss of stipend, under sect. 68 of the act, and that they had refused to do so.

Sir *J. Campbell*, A. G., *Wightman* and *Crompton*, now shewed cause. This rule was obtained under sect. 68 of the Municipal Corporation Act, which says, "that all stipends and allowances which, during seven years next before the 5th of June, 1835, have been usually paid and granted to the minister, or late minister, of any church or chapel, or to the master or usher of any school, or to the governor or master of any hospital within such borough, and all cha-

1838.

The QUEEN
v.
Mayor &c. of
LIVERPOOL.

1838.

The QUEEN
v.
Mayor &c. of
LIVERPOOL.

ritable allowances, which have been usually paid as aforesaid to the inmates of any alms-houses by such corporate body, shall be secured, as soon as conveniently may be after the passing of this act, to every person entitled or accustomed to have and receive the same, by bond or obligation under the common seal of the borough, out of whose funds the same shall be payable." Mr. *Moss* claims compensation as minister, but even if he was a minister in the popular sense of the term, or as the term is used in our church service, he certainly was never the minister of St. John's church, Liverpool. Mr. *Moss's* principal was the minister appointed under the local acts, and he himself was merely lecturer, who, ex vi termini, is a person appointed to officiate in a church, not being the regular incumbent. The word "minister," in the Municipal Act, must be construed with reference to these local acts. Now the situation of lecturer was created voluntarily by the corporation of Liverpool, and Mr. *Moss* might have been removed at any time. In *The King v. The Bishop of London* (a), a mandamus to the defendant to license a lecturer for a particular church was refused, and *Lee C. J.* observed, that the license, even if granted, might be of no effect, as the fee of the church was in the rector, who might refuse to admit the lecturer.

Sir *W. W. Follett* and *Tomlinson*, contra, were not called upon by the Court.

Lord DENMAN C. J.—The question is, whether Mr. *Moss* is to be considered to have been a minister, within the meaning of the Municipal Corporation Act, not of the local acts. We have always given to the compensation clauses in the Municipal Corporation Act the extended and liberal interpretation, of which the 68th section is fairly susceptible; for the latter part of it directs compensa-

(a) 1 Wils. 11; S. C. nom. *Anne's, Westminster*, 2 Str. 1192. *The case of the Lecturer of St.*

tion to every person "entitled or accustomed to have and receive," &c. We are not therefore restrained from awarding compensation in some cases, where the claimant may never have been invested with any strict legal right, and we feel no difficulty in making this rule absolute.

1838.

 The QUEEN
 v.
 Mayor &c. of
 LIVERPOOL.

LITLEDALE J.—I do not think *Mr. Moss* was a minister within the meaning of the local acts, but I think he was so within the meaning of the Municipal Corporation Act.

PATTERSON J.—We must construe this act by itself, with reference, not to this particular borough, but to the whole country. Under the 68th section, I think any person put by the corporation into an office, which required him to perform the duties of what is "commonly called a minister of the church," is, after perception of his stipend for seven years, entitled to compensation. The circumstance of the appointment of *Mr. Moss* being voluntary, and not under the local acts, makes no difference, for this act directs that all stipends *usually* paid and granted for seven years shall be compensated for.

COLERIDGE J.—I think *Mr. Moss* was a minister within the Municipal Act, for not only in that part of the clause which directs compensation to be paid to the minister, are comprehensive words used, but in the latter part "charitable allowances which have been usually paid," are also spoken of as the subject of compensation. *Mr. Moss*, therefore, having been appointed to an office requiring him to discharge generally all the duties devolving on a minister of the church, appears to me entitled to this rule.

Rule absolute.



1838.

Friday,
April 27th.

Entries made by a medical officer in a book, which he is directed to keep by a rule under the hands and seal of the Poor Law Commissioners, of his visits to sick paupers, are not admissible in evidence for him, as a public writing, to prove that he paid such visits.

MERRICK v. WAKLEY.

CASE for a libel published by the defendant in November 1837, in a medical journal called "The Lancet," and imputing to the plaintiff, who was the medical officer of a union, under the 4 & 5 Will. 4, c. 76, that he had been guilty of gross inattention to a sick pauper, intrusted to his care, in the above union. The defendant pleaded a justification.

At the trial, before *Alderson*, B., at the last Hereford assizes, the pauper was called, and stated that, while suffering under a most serious disease, he had been neglected and not visited by the plaintiff for several weeks together. For the purpose of contradicting the pauper, the plaintiff tendered in evidence certain entries made by himself as medical officer of the union in a book kept by him, according to a rule under the hands and seal of the Poor Law Commissioners, and called the "Weekly Return of the Medical Officer." This book purported to contain the names of all the sick paupers in the district, and the dates of the several visits paid them by the medical officer. The learned baron rejected this evidence, but the jury gave a verdict nevertheless for the plaintiff, for nominal damages, being of opinion that the defendant had not completely established his justification. The learned Baron then certified under the 43 Eliz. c. 6, to deprive the plaintiff of costs.

Ludlow, Serjt. on a former day in this term moved, on behalf of the plaintiff, for a new trial, on the ground that evidence had been improperly rejected; and also that the verdict for merely nominal damages was against the weight of the evidence. The book, containing entries of the medical officer's visits, was admissible in evidence as a public document; it is kept under a rule of the Poor Law Commissioners, who, by sect. 15 of the 4 & 5 Will. 4, c. 76, are to make rules for the administration of the laws for the relief

of the poor, which rules, by sect. 42, are to be valid and binding, as if the same were specifically made by and embodied in the act itself. It cannot be disputed that on general principles this book, on account of its public character, would be a proper instrument of evidence, as the log-book of a man-of-war is evidence to prove the time of sailing (*a*); or the book kept by the Master of this Court to prove that a particular person is an attorney (*b*); but it was contended at the trial, that as the entries in question were made by the plaintiff himself, he could not be allowed to use them on his own behalf.

1838.

 MERRICK
 v.
 WAKLEY.

Cur. adv. vult.

Lord DENMAN C. J., now delivered the judgment of the Court. On the application for a new trial in this case a question was raised as to the admissibility in evidence of certain entries made by the plaintiff in a book, in obedience to the order of the Poor Law Commissioners. This book, it was said, was entitled to be put on the same footing of authenticity with the log-book of a man-of-war and the book kept in the Master's office, containing the names of the attornies of this Court. In those and other similar cases, the entries to which credit is given, are made by a person who stands altogether disinterested and indifferent with respect to the fact, which is the subject-matter of such entries. If the entries in this case could be received in evidence, on behalf of the plaintiff, because they were directed to be made under the authority of an act of parliament, we should allow a party to make evidence for himself, and the accounts of a public accountant might also be evidence for himself on the same principle. We think the evidence was properly rejected; there will therefore be no rule; and on the other point, as to the smallness of the damages, we have communicated with my brother *Alderson*, and see no reason for disturbing the verdict.

Rule refused.

(*a*) *D'Israeli v. Jowett*, 1 Esp. 427. (*b*) *Rex v. Crossley*, 2 Esp. 526.

1838.

Friday,
April 27th.

Under the 4 & 5 Will. 4, c. 76, s. 81, requiring the parish appealing against an order of removal to deliver to the overseers of the respondent parish a written statement of the grounds of appeal, fourteen days at least before the first day of sessions, the fourteen days must be clear days, exclusively of the day of the delivery and of the first day of sessions.

The QUEEN v. The Justices of SALOP.

SIR F. POLLOCK, in Hilary term, 1837, had obtained a rule for a mandamus to the defendants to enter continuances, and hear an appeal against an order for the removal of a pauper from the parish of Newport, in Salop, to the parish of Tibberton, in the same county. The appeal came on for trial at the Epiphany sessions for the county, held the 2nd January, 1836. It was objected that the appellants could not be heard, because they had not delivered to the respondents the statement of their grounds of appeal until the 19th December preceding; whereas the 5 & 6 Will. 4, c. 76, s. 81, requires such statement to be delivered "fourteen days at least" before the first day of the sessions at which such appeal is intended to be tried. The sessions had decided in favour of the objection, and refused to hear the appeal.

Whately now shewed cause. No doubt the general rule for computation of time, in respect of notices of appeal and such matters, is correctly laid down in *Rex v. The Justices of the West Riding of Yorkshire* (a), that one day shall be reckoned inclusively and one exclusively. But "fourteen days at least" means fourteen clear days: *Zouch v. Empey* (b); and in *Rex v. The Justices of Herefordshire* (c), it was decided that the expression "clear days," with respect to notice of appeal under 49 Geo. 3, c. 68, s. 5, against an order of filiation, excluded both the day of serving the notice and the day of holding the sessions. The sessions therefore properly refused to hear this appeal.

Sir F. Pollock, contra. The expression, "fourteen days at least," means that if the appellants prefer to give a longer

(a) 4 B. & Ad. 685.

(c) 3 B. & Ald. 581.

(b) 4 B. & Ald. 522.

notice, it shall not be invalid, which it otherwise would be, in the same manner as bills of exchange, before the 43 Geo. 3, c. 127, were vitiated by having a stamp larger than necessary. Again; "fourteen days at least" may mean at least fourteen days, leaving "fourteen days" to the ordinary computation of the Courts, which is of one day inclusively and the other exclusively. If the statute had said one day at least, would it be contended that one whole day must intervene between the day of delivering the statement and the first day of sessions? The case of *Zouch v. Empsey* (a) was decided before *Hardy v. Ryle* (b), which establishes the general rule, that where the act, from which the computation is made, is one to which the party against whom the time runs is privy, the day of the act done is to be included; and notice of action is given as an instance, the party served necessarily knowing the time of service, i. e. of the act from which the computation is to be made. This case is expressly applicable, and shews that the fourteen days are to be reckoned inclusively of the day on which the statement was delivered, that being an act to which the respondents were privy. [*Coleridge J.* We lately held (c) that the three days' notice, under the rule of Hil. T. 6 Will. 4, by persons applying for admission as attornies, were to be clear days.]

1838.

 The QUEEN
 v.
 Justices of
 SALOP.

LORD DENMAN C. J.—The rule has been already laid down, that so many days "at least" means clear days: it would be more mischievous to shake this rule than to cause inconvenience in a particular case.

LITLEDALE J.—If this were *res integra*, I should say that "a day at least" cannot mean more than "a day;" but as there has been a decision, we will abide by it.

PATTESON J. concurred.

(a) 4 B. & Ald. 522.

(b) 4 M. & R. 295.

(c) *In the matter of Prangley*,
 4 Ad. & El. 781.

1838.

The QUEEN
v.
Justices of
SALOP.

COLERIDGE J.—I concur on the ground already mentioned; but if there had been no authority, my opinion would have been otherwise.

Rule discharged.

Monday,
April 30th.

The QUEEN v. THOMAS.

1. On the 20th July, 1836, at a meeting of the town council of a borough, a resolution was passed that *S.* should be elected town clerk. This office had usually been held in conjunction with that of clerk of the peace, and at an entire salary, and *S.* deposed to his belief that he was elected to both offices; but, at this time, the old borough sessions having been abolished on the 1st of May preceding

SIR J. CAMPBELL A. G., in Hilary term, 1837, had obtained a rule calling upon the defendant to shew cause why an information in the nature of a quo warranto should not be exhibited against him, for exercising the offices of town clerk and clerk of the peace of the borough of Tewkesbury, on the following grounds:—

1. That he had not been duly elected to those offices, or either of them.
2. That *Thomas Jelf Sandilands* was duly elected to those offices, and had never been legally removed.
3. That both the offices were full at the time of the supposed election of the defendant.
4. That the defendant had never been appointed to the office of clerk of the peace of the said borough.

Several affidavits were used on moving for the rule. The affidavit of *Sandilands* stated, that on the 20th July, 1836, he was, as appeared by the minute-book of the town council of the borough, elected to the office of town clerk by the Municipal Corporation Act, and no new grant of Sessions having issued, the office of clerk of the peace did not exist. On the 25th July following the council again met, and in the absence of one of the members, who had been present on the previous occasion, rescinded their prior resolution, and elected defendant town clerk, before security had been taken from *S.* for the due execution of his office under the 38th sect. of the act, and before any official intimation to him of his appointment. On the 15th August in the same year a court of quarter sessions was granted to the borough, and defendant was then elected clerk of the peace also. A rule nisi for a quo warranto having been obtained against him, on the ground that he had not been duly elected to either office, that *S.* had been elected, and had never been legally removed, and that both offices were full at the time of the supposed election of the defendant, the Court discharged it with costs, and held that there had been a good removal of *S.* from the office of town clerk, and that he could not set up want of notice of the meeting of the 25th July, no such objection appearing in either the rule or the affidavits.

2. *Quere*, Whether it was requisite that there should have been notice of the meeting, which was an adjourned quarterly meeting, and a summons to the members of the town-council to attend.

at a meeting held on that day. That he understood and believed the clerkship of the peace of the borough was to be held by him in union with the town clerkship, both offices having been held by the former town clerk, Mr. *Williams*, at one and the same salary, at the time of his resignation on the 19th July, 1836, and various entries made in the minute-book of the town council were set out as the grounds of this understanding and belief. That on the 22d July deponent was waited upon by three councillors, and requested to relinquish his office of town clerk, and told that he would be ousted if he did not; that he then said he would put himself in the hands of his friends, by whose favour he had been elected, and would resign if they thought he ought to do so. That on the 25th July, however, he wrote to request the mayor to convene a meeting of council for the purpose of investing him with the joint offices of town clerk and clerk of the peace. That it further appeared from the minutes of the said council, that at an adjourned quarterly meeting of the council held on the same 25th of July, it was resolved, "that the resolution of the last meeting appointing Mr. *Sandilands* town clerk be rescinded," and that it was further resolved, "that Mr. *Joshua Thomas* (the defendant) be appointed town clerk." That deponent believed that defendant had acted as town clerk and clerk of the peace of the borough, under this appointment, from that time to the date of the affidavit. That one member of council who voted on the 20th July for deponent's election, did not attend at the meeting of the 25th July, nor consent to rescind deponent's election. The other affidavits corroborated the affidavit of Mr. *Sandilands* generally, and stated also that the two offices of town clerk and clerk of the peace had been held in conjunction by the former town clerk, Mr. *Williams*, at an entire salary, and that Mr. *Thomas* had, ever since the 25th July, taken upon himself the duties of both the said offices.

The affidavits filed in opposition to the rule stated, that the election of *Sandilands*, on the 20th of July, was the

1838.

The QUEEN
v.
THOMAS.

1838.

THE QUEEN
v.
THOMAS.

result of misapprehension and mistake, and that no official intimation was given to him of his election. That neither at the meeting of the 20th nor of the 25th July, was it ever proposed by the council to appoint to the office of clerk of the peace. That the office of clerk of the peace had reference only to the existence of a separate Court of Quarter Sessions; and that, although usually held by the town clerk, it was well known to be a distinct office. That, under the provisions of the Municipal Reform Act, the criminal jurisdiction of the justices of the peace, appointed by the late corporation, and the holding of the Court of Quarter Sessions, were continued only to the 1st of May, 1836, and it was therefore necessary that Mr. *Williams* should be re-appointed to the office of clerk of the peace, but that on the 1st May the office no longer existed, and that from that day Mr. *W.* never did act as clerk of the peace, there being then no separate Court of Quarter Sessions. That it was not until the 15th August following that the council were informed that a grant of quarter sessions to the borough had issued, and that on that day they elected defendant clerk of the peace. That *Sandilands* never applied to the mayor to call a meeting to invest him (*Sandilands*) with the office of town clerk and clerk of the peace, or either of them; that *Sandilands* never acted in either office, nor made or subscribed, or offered to make or subscribe, the declarations required by the Municipal Act; but that defendant did, on the 13th August, 1836, make and subscribe the said declarations in respect of the office of town clerk, and on the 19th of the same month take the oaths of office and make the declarations required in respect of the office of clerk of the peace.

Sir *W. W. Follett* now shewed cause. The present rule is irregular; it is directed against the defendant for exercising two offices, which are distinct in their nature, and have no necessary connection with each other. The 58th section of 5 & 6 Will. 4, c. 76, (the Municipal Corporation

Act,) gives power to the council of a borough to appoint a town clerk, who is to hold his office during pleasure. But the clerk of the peace is appointed under the 103d section, and is to hold his office, not during pleasure, but during good behaviour.

The town council therefore have a right to remove their town clerk without assigning any reason whatever; and Mr. *Sandilands* was properly removed from that office, if indeed he ever was elected to it. But with respect to the other office, of clerk of the peace, he can have no title to that, for it had no existence whatever on the 20th July, the time of his supposed election. The old borough sessions, together with the office of clerk of the peace, which was incidental to them, were abolished, by the 107th sect. of the act, on the 1st of May, 1836, and the office was not revived until a new Court of Quarter Sessions was afterwards granted to the borough on the 15th August in the same year. As Mr. S. therefore could have no title to this office, and was removed from the other, the defendant has a clear title to both offices.

Sir *J. Campbell* A. G., and *R. V. Richards*, contra. A multifarious rule of this kind is by no means uncommon, and is perfectly regular—as for exercising the offices of alderman and justice of the peace, or those of mayor, alderman and common councilman.

Sandilands himself has a clear title to both offices, but it is not necessary to contend for so much, as, unless the defendant has a clear title, this rule must be made absolute. It has not been denied that *Sandilands* was elected town clerk on the 20th July. On the 23d he applies to the mayor for investiture in the office, so that what took place on the day preceding goes for nothing, and cannot be construed into an abandonment of his rights. But it is said that he held office during pleasure only, and that such pleasure was determined on the 25th July. Now the pleasure of the council was not properly determined, nor was it

1838.

 The QUEEN
 v.
 THOMAS.

1838.
 The QUEEN
 v.
 THOMAS.

notified to *Sandilands* in any way. The office of attorney-general is held at the pleasure of the sovereign, but it must be determined in a regular way under the great seal. In order to rescind the resolution for the appointment of *Sandilands*, the same members of council who were present on the 20th July should have attended on the 25th, whereas one member who voted for the appointment was absent when it was rescinded; *Rex v. Harris (a)* and *Rex v. Doncaster (b)*, shew that Mr. *Sandilands* was entitled to notice of the subsequent meeting, and that the members of council should have been summoned. (The Court stopped this part of the argument, because the last-mentioned grounds were not stated in the rule, or in the affidavits.)

With regard to the office of clerk of the peace also, this rule must be made absolute; because, although no such office existed on the 20th July, and *Sandilands* therefore could have no title to it, yet the affidavits shew that the defendant acted in that office from the 25th July to the 15th August, without any title; and as there is nothing to shew to the contrary, it may be presumed also that he continued to act afterwards under the void appointment of the former date.

LITLEDALE J. (c).—With regard to the clerkship of the peace, it is clear that, on the 25th July, 1836, no such office existed in this borough. The defendant might, notwithstanding, be liable to this information, if he assumed to act, as if there was such an office, and as if he was intitled to exercise it. But although liable for any usurpation between the 25th July and the 15th August, it is clear that he had, on the day last mentioned, a legal title, and the rule does not seek to make him responsible for his acts during the intermediate period (d). It is said it does not appear

(a) 1 B. & Ad. 936.

(b) 2 Burr. 738. See *Rex v. Town of Liverpool*, 2 Burr. 723.

(c) Lord Denman C. J. was at

the Privy Council.

(d) The language of the rule was, "to shew by what authority he *claims* to exercise," &c.

under which appointment he has since acted; but where a person may be acting under either of two appointments, the one legal and the other not so, we must presume that he acts under that which is legal,—a principle assumed in *Lucas v. Nockells* (a). Another question is raised as to the office of town clerk, and it is objected that Mr. *Sandilands* was not properly displaced, and therefore that Mr. *Thomas* was not properly elected. This question might be a very important one, if it appeared by the affidavits on which this rule was obtained, that no notice was given, in the manner pointed out by the 69th section of the Municipal Act, of the meeting of the 25th July, and also of the objects for which it was convened. The affidavits are defective in this respect, and we must assume that the meeting was properly held. The resolution then for the election of *Sandilands* was rescinded, and *Thomas* was elected. I think, under these circumstances, *Sandilands* was properly displaced. This rule therefore must be discharged, and I should have said without costs, if it related merely to the office of town clerk, but as it relates also to the other office, about which no question ought to have been raised, it must be discharged with costs.

PATTESON J.—So far as the office of clerk of the peace is concerned, no attempt has been made to impugn the election of the defendant on the 15th August, but it is contended that he acted under the void appointment of the 25th July. Why are we to assume that, when he could not have so acted legally, inasmuch as the office had no existence? It is absurd to suppose the office of clerk of the peace, which is held during good behaviour, was incidental to the office of town clerk as the principal office, which is held during pleasure, and that *Sandilands*, although removed from the town clerkship, must still continue in possession of the other office. With respect to the defendant's election

1838.

The QUEEN
v.
THOMAS.

(a) 4 Bing. 729. See *Dr. Groenvelt v. College of Physicians*, 1 Com. Rep. 76; S. C. 12 Mod. 386, nom. *Dr. Grenville*.

1838.

 The QUEEN
 v.
 THOMAS.

to the office of town clerk, one ground on which this rule was obtained was, that at the time of his election the office was full. Now the office was not full if *Sandilands* was properly removed; and it is to be observed also, that no security had been taken from him for the due execution of that office, as required by sect. 58, so that it would appear that his appointment was not complete. Want of notice of the meeting, and of the business to be transacted, according to the 69th section, and also of notice to *Sandilands* himself, might present insuperable objections to the validity of the meeting on the 25th July, if the objections were open to the prosecutor on these affidavits. But the Attorney General admitted, very properly, on moving for this rule, that as the affidavits do not distinctly set out want of notice, we must assume the meeting was regular in that respect. That being so, I think the resolution, rescinding the prior appointment of *Sandilands*, was effectual; and, as there was no reason for questioning the defendant's title to the office of clerk of the peace, that this rule must be discharged with costs.

COLERIDGE J.—The only argument urged in support of this rule, so far as it relates to the office of clerk of the peace, is, that the defendant does not deny that he has acted in this capacity since the 25th July, 1836. But surely it was not necessary for him to deny that, for the valid appointment of the 15th August is a sufficient answer to so much of the rule. With regard to defendant's title to act as town clerk, two objections are made; first, that there was no good removal of *Sandilands*; and, secondly, that all that took place on the 25th July was void for want of notice. As to the first objection, *Sandilands* could not have been removed formally, because the office was not full. The second objection I beg to be understood to dispose of on the ground that it is not open to the prosecutor, because he has not introduced it in the affidavits and rule; this is required by the general rule of H. T. 7 & 8 Geo. 4, just as much as if

the objection to an election were, that there had not been any good presiding officer. I agree entirely that this rule should be discharged with costs.

Rule discharged with costs.

1838.

 The QUEEN
 v.
 THOMAS.

The QUEEN v. W. L. ROBERTS.

Wednesday,
 May 2d.

INFORMATION in the nature of a quo warranto, of Hilary term, 1836, against the defendant, for usurping the office of alderman of the borough of Carnarvon.

Plea: that on the 31st December, 1835, the defendant was duly elected to, and accepted, the office of alderman of the said borough, according to the provisions of the Municipal Corporation Act (5 & 6 Will. 4, c. 76). Verification.

Replication: 1. That defendant was not duly elected, modo et formâ; on which issue was joined. 2. That heretofore and before the said supposed due election of the defendant, to wit, on the 26th of December, 1835, being the day appointed for the first election of councillors, under the provisions of the said act, eighteen persons, being the number in the said act in the said plea of the defendant referred to, in that behalf mentioned and provided, had been and were elected to be councillors of the said borough, according to the provisions of the said act, such persons being the councillors first elected under the said act: that on the said supposed due election of the defendant to be an alderman of the said borough, on the said 31st December, 1835, being the day named and appointed for the first election of aldermen, under the provisions of the said act of parliament, sixteen of the said eighteen persons, so as in this replication aforesaid elected to be councillors of the said borough of Carnarvon, and no greater number, assem-

1. The defendant's title to the office of alderman was questioned by quo warranto, on the ground that, although he had a majority of votes, the full number of aldermen for the borough, at the first election after the passing of the 5 & 6 W. 4, c. 76, had not been elected, and that therefore his election was void. On demurrer to a replication, setting out the above circumstances, to shew the defect in defendant's title, the Court held that the defect, if any, was cured by the 1 Vict. c. 78, s. 2, and gave judgment for him.

2. Held also, that the prosecutor was not entitled to costs under sect. 20, as no application to discontinue the proceedings already commenced had been made immediately after the passing of the act.

1838.

The QUEEN

v.

W. L.
ROBERTS.

bled and met together at the said borough of Carnarvon, for the purpose of electing from the said councillors, or from the persons qualified to be councillors, the aldermen of the said borough; that at the time and on the occasion last mentioned, there were twelve candidates for the office of aldermen of the said borough, to wit, the defendant, one *R. Griffiths*, one *H. R. Williams*, one *S. P. Boileau*, one *G. Johnstone*, one *J. Jones*, one *P. Ellis*, one other *R. Griffiths*, one *R. M. Preece*, one *J. Thomas*, one *T. Jones*, and one *W. Griffiths*; that at the time and on the occasion last aforesaid, the said sixteen of the said eighteen persons, so as in this replication aforesaid elected to be councillors of the said borough, which said sixteen persons were so assembled and met together as aforesaid, for the purpose in that behalf aforesaid, gave and delivered their votes for the said twelve candidates, for the office of aldermen of the said borough, in manner following; that is to say, for the defendant nine votes, for the said first-mentioned *R. Griffiths* nine votes, for *H. R. Williams* eight votes, for *S. P. Boileau* eight votes, for *G. Johnstone* eight votes, for *J. Jones* eight votes, for *P. Ellis* eight votes, for the secondly mentioned *R. Griffiths* eight votes, for *R. M. Preece* eight votes, for *J. Thomas* eight votes, for *T. Jones* seven votes, and for *W. Griffiths* seven votes; that defendant was not, at any time after the making and passing of the said act of parliament, in his said plea mentioned, elected to be an alderman of the said borough of Carnarvon, save on the occasion and in manner in this replication in this behalf aforesaid, and so the said coroner and attorney saith, that at the time and on the occasion of the said supposed due election of the said defendant to be an alderman of the said borough, in his plea mentioned, six aldermen, being the number in the said act in his plea mentioned, and by that act directed and required to be elected for the borough of Carnarvon, were not elected, without this, that the defendant was duly elected an alderman of the said borough of Carnarvon, according

to the provisions of the said act of parliament, in the plea of the defendant above mentioned.

Verification. Demurrer and joinder.

The defendant stated in the margin, that on the argument of this demurrer he should contend "that the plea sufficiently shows the defendant was elected an alderman, and that it is no answer to say that the full number of aldermen was not filled up."

Jerois, in support of the demurrer. The question is, whether the two candidates, who had a majority of votes, were not elected, although the whole number of aldermen, namely, six, was not completed, on account of the equality of votes given to other candidates. Now, whatever might have been the case, if 1 *Vict.* c. 78, had not passed, that statute has at all events given validity to this election. The second section, which was expressly intended to meet this case, then known to be pending in this Court, provides, "that all elections duly made, or other acts done, since the said 28th December (1835), at any meeting of the council or councillors of any borough, named in either of the schedules of the said act, by a majority of the members of the council or councillors present at such meeting, the whole number present not being less than one-third part of the whole council, shall be good, notwithstanding that the whole or due number of aldermen may not then have been elected." And it is to be observed, that this section sets up the election absolutely, and without reference to the terms of the 20th section, to which the case of an election without a good presiding officer is subjected by the first section. It might also be contended, if necessary, that under the Municipal Corporation Act itself (5 & 6 *Will.* 4, c. 76,) the election of defendant was good, without the aid of the statute of *Victoria*. The election of the aldermen, as well as of the mayor and councillors of a borough, is directed by the 25th section of the Corporation Act. The defendant had a majority; at what particular time was his

1838.

The QUEEN
v.
W. L.
ROBERTS.

1838.

 The QUEEN
 v.
 W. L.
 ROBERTS.

election bad? Is a candidate, after it is ascertained that he has a clear majority, to await the result of a scrutiny as to the other candidates, before he can be said to be elected? or is his election to be invalidated if another person, who has been elected, chooses to disclaim? By the 49th sect. the mayor is to be elected out of aldermen or councillors; but if such an election as the present be good for nothing, there might be no aldermen or councillors to elect from.

R. V. Richards, contra. The election in question was not an ordinary election, but the original election, by which, after the passing of the Municipal Corporation Act, the borough itself was to be constituted. The component parts of the borough must be formed completely at the first election, whatever may be the case at any subsequent period. The 25th section says, that the mayor, aldermen and councillors, for the time being, shall be called the council, and there can be no council until the proper number of aldermen has been elected. The cases put on the other side, under sections 49 and 51, cannot arise until after the constituent members of the borough have been created. And the same answer applies to the 1 *Vict.* c. 78, s. 2, which has been relied upon. It cures such elections as the present, if duly made at any meeting of the council. Now the use of the word "council" shews that an ordinary election is here intended, and not the original election, under which the borough is constructed, for there can be no council until after aldermen have been chosen at the original elections. [*Patteson J.* It says "council or councillors," as if to comprehend the original election, for they are the very persons who are to elect the first set of aldermen.] Still it says councillors of the "*borough*," so that the objection recurs, for there can be no "*borough*" until after the original election.

Jervis, in reply.—The statute of *Victoria* was passed for the purpose of remedying defects, and quieting doubts,

which had been suggested by different applications to this Court. Now the only case within section 2 of the statute, was this very case, which must therefore have been directly contemplated by the legislature. If the argument on the other side be good, there is no such thing as a borough in the kingdom, and never can be, for the mayor, it is said, is to be elected by the council, and the council cannot exist without the mayor.

1838.

The QUEEN
v.
W. L.
ROBERTS.

LORD DENMAN C. J.—If the 1 *Vict.* c. 78, remedies the defect, if any, in this election, it is unnecessary to consider whether the election would have been good, if that statute had not passed. It appears to me that the second section was clearly meant to apply to this very case, which was known to be pending at the time. The clause may be ambiguous in some of its terms, but the alternative expression “or councillors,” seems to obviate the difficulty suggested.

LITLEDALE J.—Whether this election was good under the provisions of the Municipal Corporation Act, appears to me very doubtful. But I have no hesitation in saying, that it is, at all events, set up by the recent act of *Victoria*. It is said that this act applies only to elections at a meeting of the council or councillors of any “borough,” and that it cannot therefore apply to the present election, which took place before the “borough” had been constructed. But the word “borough” may there mean any place which was a borough before the act, as this was, for it is mentioned in schedule A. of the Corporation Act.

PATTESON J.—Whatever doubt there may be as to this election, under the Corporation Act, it is clearly resolved by the statute of *Victoria*. The words “council or councillors” are used here in opposition, as if for the purpose of including the original as well as subsequent elections. So they are used also in sect. 25 of the former act, which

1838.

 The QUEEN
 v.
 W. L.
 ROBERTS.

says, "on the 9th day of November, in this present year, (that is, at the original election,) the *councillors* first to be elected under the provisions of this act, and on the 9th day of November in the year 1838, and in every third succeeding year, the *council* for the time being of every borough, shall elect from the councillors, or from the persons qualified to be councillors, the aldermen of such borough, or so many as shall be needed to supply the places of those who shall then go out of office, according to the provisions hereinafter contained." The original election is the only one therefore at which the *councillors* could elect aldermen, so that this case is pointedly referred to.

COLERIDGE J.—My brother *Patteson's* argument as to the 25th section is very strong to shew that the word "councillors" was introduced to meet this very case.

Judgment for defendant.

R. V. Richards made an application for costs, under the 20th sect. of the statute of *Victoria*. The Court refused the application.

Thursday,
 May 10th.

Sir *W. W. Follett*, on the last day of this term, moved for a rule calling upon the defendant to shew cause why the defendant should not pay the relator's costs. As the Court have decided that the defect in the election here was cured by sect. 2 of 1 *Vict.* c. 78, the prosecutor, under sect. 20, is entitled to his costs (*a*). [Lord *Denman* C. J. The words

(*a*) That section enacts, that "every proceeding commenced before the passing of this act, and still pending in the Court of King's Bench, against any person, upon any ground in which it is herein declared that the validity of the election into any corporal office shall not be questioned, or for the purpose of bringing into question the validity of any election or act,

which is herein declared to be good, shall be discontinued immediately upon the passing of this act, upon payment of the costs incurred up to that time; and the prosecutor or relator shall be entitled to receive from the defendant, in every such proceeding, all such costs, to be taxed as between attorney and client, according to the practice of such Court."

of the act are, that the proceedings "shall be discontinued on payment of costs," but we have decided, in *Regina v. Jones (a)*, that the act does not, of itself, discontinue the proceedings, and that special application for the purpose should be made to the Court.] The application should be made by the defendant, not by the prosecutor. The reference in the 1st sect. to the payment of costs under the 20th sect. is not repeated in the 2d section, but the intention of the legislature was obviously to allow the prosecutor costs in all cases, where the defendant avails himself of the statute to cure any defect in his title.

1838.

 The QUEEN
 v.
 W. L.
 ROBERTS.

LORD DENMAN C. J.—I think an application to discontinue should have been made to the Court immediately after the passing of the act, by one side or the other, in order to give us the jurisdiction to interpose with respect to costs. If an application had been made by the prosecutor, and it had appeared that the remedial provision in the act was not relied on by the defendant to support his title, we should have considered that the case was not within the provision of the 20th sect. as to costs, and that we had not the power to grant them. We have certainly no power now to disconnect costs from the judgment which has been given in favour of the defendant.

LITLEDALE J.—Sect. 20 is badly worded, for discontinuance on payment of costs would mean, in ordinary language, that the prosecutor, who had commenced the proceedings, should pay costs, but that of course is not intended. The act itself does not put an end to the proceedings, and the term "discontinuance" seems to imply that something shall be done by one side or the other, and, I think, to entitle the prosecutor to costs, the application should have been made to the Court immediately after the act passed.

PATTESON J.—The Court has already determined that sect. 20 does not determine proceedings of itself, for in

(a) Not yet reported.

1838.


The QUEEN
v.
W. L.
ROBERTS.

every case there may be a question, whether the defect in the election is such a defect as is cured by the statute. An application, therefore, to discontinue, either from the relator or the defendant, is in all cases necessary. If the relator feels that the objection he relies upon is cured by the act of parliament, it is very easy for him to apply to the Court for discontinuance of the proceedings, on payment of costs by the defendant. It is easy also for the defendant to apply and to compel the relator to discontinue. If neither party apply, then the side which ultimately succeeds, when the question as to the validity of the election is disposed of, must have his costs, for it is always open to the relator to contend the act did not apply, and he did so contend in the present case.

COLERIDGE J.—By the words of the clause, the discontinuance is to take effect upon the payment of costs, which therefore appears to be a condition precedent to the discontinuance. The practical question is, whether the relator might have made this application at an earlier period, for if he might, he ought to have done so. There is no doubt he might have applied immediately after the passing of the act, for though it is objected he could not know whether the defendant intended to rely on the recent statute or not, he might have ascertained that by making the application.

Rule refused (a).

(a) See *Regina v. Roberts*, decided in Trinity term, *post*.

The QUEEN v. The Inhabitants of ST. JOHN'S, in
BEDWARDINE.

Wednesday,
May 2d.

A settlement is gained by a pauper, who has occupied a tenement for a year, and paid 10*l.* rent in respect of it, although the sum of 6*s.* for tithes has been paid by his landlord.

ON appeal against an order of justices for the removal of *Thomas Bryan*, his wife and children, from the parish of Upton-upon-Severn, in the county of Worcester, to the parish of St. John, in Bedwardine, in the same county,

the sessions confirmed the order, subject to the following case:—The pauper, *Thomas Bryan*, being legally settled in the parish of St. John, in Bedwardine, at Michaelmas, 1829, took a house and buildings, two gardens and an orchard, in Upton-upon-Severn, for a year, of one *Edward Perrins*, at 10*l.*, the landlord agreeing to discharge all taxes and payments for that period. Previously to entering into this arrangement, *Perrins* had offered the premises to the pauper for 9*l.*, the latter satisfying the taxes and payments, but the tenant preferred to take at 10*l.*, upon the terms above stated. The premises were occupied for a year under that hiring, and the sum of 10*l.* paid to the landlord in respect of them. Under the head of payments, the landlord satisfied a claim for tithes, becoming due in the course of the year, to the amount of 6*s.* If the Court shall be of opinion that, under the above circumstances, the pauper *Bryan* obtained a settlement in the parish of Upton-upon-Severn, then the order of removal is to be quashed; but if the Court shall be of a contrary opinion, such order is to be confirmed.

1838.

 The QUEEN
 v.
 ST. JOHN'S,
 BEDWARDINE.

Whitmore, in support of the order of sessions. No settlement was gained in this case, because the tithes were satisfied by the landlord, so that in effect he did not receive 10*l.* for rent. *Rex v. Framlingham* (a), *Rex v. St. Paul's, Deptford* (b), and *Rex v. Thurmaston* (c), have, it is true, decided that a settlement by renting a tenement is not invalidated, although the landlord pay for the pauper all rates and taxes chargeable upon the tenement. But the payment of tithes is distinguishable in its character from payment of rates and taxes. Rates and taxes fall upon the land only, and are quite unconnected with personalty; whereas tithes, according to *Blackstone's* definition (d), arise partly from personal industry. If a settlement, therefore, be allowed in this case, it will be very difficult to draw the line, and to say what

(a) Burr. S. C. 748.

(a) 1 B. & Ad. 731.

(b) 13 East, 320.

(d) 2 Bl. Com. 24.

1838.

 The QUEEN
 v.
 ST. JOHN'S,
 BEDWARDINE.

particular kind of payments only may be made for the tenant, without affecting his right of settlement. In *Rex v. Thurmaston (a)*, Lord Tenterden C. J. says, that in that case the benefit conferred on the tenant was in its nature connected with the occupation, but that in cases of collateral benefit, unconnected with the occupation of the tenement, there might be ground for saying that the house was not *bonâ fide* rented at 10*l.* a-year. Tithes bear frequently a very large proportion to the rent, as in the case of garden ground, where tithes are payable in the ratio of its productiveness.

W. J. Alexander, *contrâ*. Rates, as well as tithes, are derived partly from personal industry, because, if land is unoccupied and uncultivated, no rates are payable in respect of it. There is no ground, therefore, for the distinction taken. The criterion afforded by the legislature in 6 *Geo.* 4, c. 57, explained by 1 *Will.* 4, c. 18, is, the amount which the tenant pays, and not what the landlord receives. The 6 *Geo.* 4 then having said that rent shall be the criterion, and *Rex v. Thurmaston (a)* having decided what rent is, there is an end of this question. In that case the landlord satisfied the levies and rates, and here, the taxes and payments; but in both cases the outgoings so satisfied were chargeable upon the tenement, for undoubtedly tithes are so; so that Lord Tenterden's observations about collateral benefits, unconnected with the occupation, do not apply.

LITLEDALE J. (*b*)—The settlement has been gained in this case. The facts are not distinguishable from *Rex v. Thurmaston (a)*.

PATTESON J.—I am of the same opinion. If a man rents a tithe-free farm, he does not the less pay rent for it.

COLERIDGE J.—I am very unwilling to introduce any

(a) 1 B. & Ad. 731.

(b) Lord Denman C. J. was in attendance at her Majesty's levee.

nice distinctions in the poor laws. *Rex v. Thurmaston* (a) is quite in point.

Rule absolute for quashing the order of sessions.

(a) 1 B. & Ad. 731.

1838.

THE QUEEN
v.
ST. JOHN'S,
BEDWARDINE.

THORN v. Sir CHARLES ABRAHAM LESLIE, Bart.
(a prisoner.)

Thursday,
May 3rd.

THE defendant having come up on a former day in this term (April 26) in the custody of the Marshal of the Marshalsea, to be discharged by supersedeas, *Wordsworth*, for the plaintiff, appeared to oppose his discharge. The plaintiff's affidavit set out that the cause had been tried at the third sittings in Michaelmas term, 1836, when a verdict had passed for the plaintiff; that the plaintiff had, up to December, 1837, made repeated applications to the defendant's bail to render him, but, on account of their poverty, had taken no proceedings against them. It then stated an application by the defendant, at the office of the plaintiff's attorney, to render himself in December last, and denied that the plaintiff had ever received any notice of the defendant's surrender; and *Wordsworth* cited 1 *Tidd's Pr.* 288, (9th ed.) to shew the necessity of notice to the plaintiff's attorney. The Court, on the application of the prisoner, postponed the case till this day, that he might provide himself with counsel. On April 28th the prisoner filed an affidavit stating that he had rendered himself in discharge of his bail on 5th December, 1837, and that he had given notice thereof in writing to the plaintiff's attorney (a).

1. Where the trial is in term and the defendant surrenders himself in discharge of his bail in a subsequent vacation, the surrender relates back to the preceding term.

2. The affidavit of notice of render required to be made by Reg. Trin. 1 *Anne*, may be made at any time before the defendant is charged in execution.

Humfrey now appeared for the prisoner. The trial in this case was in Michaelmas term 1836. According there-

(a) A point was made whether turned entirely on the facts of the the notice was sufficient, which case.

1838.

THORN

v.

LESLIE.

fore to the Reg. Gen. Hil. 2 *Will.* 4, no. 85, the prisoner was supersedable unless the plaintiff charged the defendant in execution within two terms inclusive after his surrender, which was in Michaelmas vacation. A surrender in vacation, when the trial was in term, relates back to the preceding term, *Neill v. Lovelass* (a). The plaintiff, therefore, ought to have charged him in execution in Hilary term last.

Wordsworth contra. Besides a notice in writing of a prisoner's render, the rule Trin. 1 *Ann.* requires that, "the attorney for such defendant shall, without delay, give notice of such rendering to the plaintiff's attorney, and *shall make affidavit* thereof before the bail in that action shall be filed or discharged, and in default thereof such rendering shall be void." The practice of the Court therefore, and the terms of this rule, require the affidavit of notice to be made simultaneously with the notice itself, and as that was not done here, the render is void, [*Patteson* J. The words of the rule only require the affidavit to be made *before* the bail are discharged; they do not require it immediately after the render. *Coleridge* J. In the original Latin rule the word is "præstiterit;" the translation therefore, "shall make affidavit," is incorrect.](b). That may be so, but in practice it is always considered that the affidavit should be made at the time. *Lepinc v. Barratt* (c) shews the consequence of notice of render not being given to the bail. The second question is, whether the defendant has been charged in execution within two terms. By the rule Hil. 26 *Geo.* 3, a prisoner is entitled to be discharged "in case of a surrender in discharge of bail, after trial had, or unless the plaintiff shall cause the defendant to be charged in execution

(a) 3 B. Moore, 8.

(b) Trin. 1 *Anne* "Ordinatum est qd' ubi aliquis Defend' in aliqua actione hic in Cur' penden' reddit' fuit custod' Mar' hujus Cur' in exoneratione manucapto', suor', Attorn' protali defend' indilate dabit notitiam de tali redditione

Attorn' pro Quer', & præstit'it sacramentum inde priusquam Ball' in actione illa fuit affilat', seu exonerat', & in defectu inde talis redditio vacua erit."—*Rules of Court*, 1747. *Lintot*.

(c) 8 T. R. 229.

within two terms next after such surrender and the notice thereof, of which two terms the term wherein such surrender shall be made shall be taken to be one." But in *Smith v. Jeffreys* (a) it was held, that when the surrender was in vacation, after verdict, the preceding term was not to be reckoned as one. The surrender here was in vacation after verdict. [*Patteson J.* In that case the trial was in vacation, and the render then ought not to relate back to a term antecedent to the trial; but have you any authority to shew that when the trial is in term, the render in a subsequent vacation shall not relate to the preceding term?] It is submitted that the rule of Court (b), which directs that all judgments shall be entered of the day when they are signed, points out that a render also shall date from the day on which it takes place.

LITLEDALE J. (c)—I think this rule ought to be discharged. There may be some question as to the regularity of the notice of surrender, but altogether I think it will do. Then has the prisoner been charged in execution within two terms of his render, according to the rule 26 *Geo. 3*? The question simply is, whether, when the render is in vacation, the trial having been in term, it is to be considered a surrender of the preceding term. In practice it certainly is so; and as to the new rule, which directs judgments to be entered of the day when they are signed, it neither in terms includes, nor ought it to be extended in equity to, the present case.

PATTESON J.—The rule of 26 *Geo. 3*, is quite decisive of the present case, unless it is altered by some subsequent rule. It is contended that it is altered by the analogy of the case to the rule of Hil. 4 *Will. 4*, as to signing judgment, but there really is no analogy between the two cases. This is not like the case of *Smith v. Jeffreys* (a), where the trial was in vacation, and it was held that the render after

1838.

THORN
v.
LESLIE.

(a) 6 T. R. 776.

(c) Lord Denman C.J. was absent.

(b) Reg. Gen. Hil. 4 *Will. 4*, no. 4.

1838.

THORN
v.
LESLIE.

verdict was not to relate back to the preceding term. I quite agree to the principle of that case, and though it is true that *Borer v. Baker* (a) is quite the other way, I confess I do not subscribe to that decision.

COLERIDGE J. concurred.

Defendant superseded (b).

(a) 2 Dowl. P. C. 608.

this term on the authority of *Borer*

(b) See *Baster v. Bailey*, 3 M.
& W. 415, which was decided in

v. Baker, 2 Dowl. P. C. 608.

Thursday,
May 3d.

BRISCO v. LOMAX and another.

1. On an issue as to the boundary between manors A. and B., it is competent to prove what the boundary is between manors A. and C., where the nature of the latter boundary, being a ridge of hills, renders it probable that the same line is continued on as the boundary between the contending manors.

TRESPASS for breaking and entering the plaintiff's close, and destroying and subverting certain posts and boundary stones there lying. Pleas: 1, that the close in which &c. was not the close of the defendant. 2. As to destroying the posts, a traverse. 3. As to all the trespasses, except the destroying of the said posts, the defendants pleaded that the locus in quo had been from time immemorial within and parcel of the manor of Rochdale, and that the locus in quo was the soil and freehold of one *James Dearden*, lord of the manor of Rochdale, and then justified as the servants of the said *James Dearden*. Replication to the third plea, that the locus in quo was not at the several times when &c. parcel of the manor of Rochdale, and that it was not the soil and freehold of the said *James Dearden*.

2. In the 13 Car. 1, a commission issued out of the Duchy Court of Lancaster, reciting that the lords of the manors of A. and C. had petitioned the crown, shewing that the boundaries between their two manors were uncertain, and that suits were likely to grow thereout, for prevention whereof it directed the commissioners to repair to the spot and impanel a jury for the purpose of setting out the boundaries. The return stated that the commissioners had inquired into the matter, being attended by the parties interested, and that a jury of the body of the county had been sworn to inquire and true verdict give concerning the boundary, and thereupon the commissioners set out the boundary by marks and stones:—Held, that this was a proceeding in the nature of a verdict before a court of competent jurisdiction, and therefore admissible in a question of manorial boundary where reputation was admissible, and that it was not to be excluded on the ground that it had taken place *post litem motam*, or because it did not appear that any decree had been made.

At the Yorkshire Summer Assizes, 1836, before *Parke B.*, it appeared that the question in dispute between the parties was as to the right to a large tract of moor lands on the hills dividing the counties of Lancaster and York. The plaintiff claimed as a copyholder of the manor of Wakefield, in Yorkshire, the defendants justified as servants of Mr. *Dearden*, who was lord of the manor of Rochdale in Lancashire.

The plaintiff, in opening his case, undertook to prove that the boundary line of the manor of Rochdale did not include the tract in question, but that it was within the manor of Wakefield, and that the manor of Rishworth was a subinfeudation of the manor of Wakefield. The manor of Rochdale is bounded on its eastern boundary by the manor of Wakefield towards the north-east, and by the manor of Rishworth towards the south-east; and the plaintiff proposed to prove that the boundary between the manors of Rishworth and Rochdale was a natural boundary formed by the ridge of a chain of hills, running nearly north and south, for the purpose of shewing that the same range formed the boundary between Rochdale and Wakefield; but it was objected that such boundary had nothing to do with the boundary between the manors of Wakefield and Rochdale, which was the question in issue. The learned baron, however, admitted the evidence. The plaintiff then tendered in evidence an examined copy of a commission and return deposited in the Duchy of Lancaster Office. The commission, bearing date 1 July, 1637, (13 Car. 1), issued from the crown in right of the duchy, for the purpose of ascertaining the boundaries between the manors of Rishworth and Rochdale. This evidence was objected to, on the ground that even if the question had been between lords of the same manors which were the subject of the commission, it would have been inadmissible, much more as between the parties to this action, and *Richards v. Bassett* (a) and *Rogers v. Wood* (b) were cited. The learned

1838.

BRISCO
v.
LOMAX
and another.

(a) 10 B. & C. 657.

(b) 2 B. & Ad. 245.

1838.

BRISCO

v.

LOMAX
and another.

baron received this evidence also on the ground that it was a proceeding in a court of competent jurisdiction respecting boundaries of manors in which the public have an interest, and on the authority of *Tooker v. Duke of Beaufort* (a), and the verdict passed for the plaintiff.

The commission of 13 Car. 1, was directed to eight commissioners, and recited that Sir *William Savill*, Bart. and Sir *John Byron*, Knight of the Bath, had made their humble petition to *Edward Lord Newburghe*, Chancellor of our Duchy of Lancaster, shewing thereby, that "whereas Sir *William Savill's* manor of Rishworth, in the county of Yorke, and the lands, wastes and commons thereof, are adjacent and bordering upon Sir *John Byron's* manor of Rochdale and Butterworth, in the county of Lancaster, and upon divers of the lands, wastes and commons of the said Sir *John Byron* within his said manor and parish of Rochdale respectively, the boundaries whereof being uncertain, suits are likely to grow between the said parties and their tenants, for prevention whereof the said Chancellor, taking the premises into due consideration, and willing and myndinge the boundaries thereof may be discovered and made known, has assigned and appointed you &c. to repair yourselves to the said manor, lands and premises, or to any other place or places to you seeming meet, and there to call before you the parties interested in the said manors, lands and premises, and to search out the true metes and boundaries of the said manor" &c., and authorizing the sheriff of York to impanel a jury for the above purposes.

A return was made to the said commission, setting out that the parties interested came and were attended by their agents or solicitors, and that the sheriff of the county of York caused to come before the commissioners a jury of good and sufficient freeholders of the said county, who were sworn to inquire and true verdict give concerning the boundaries between the said manors, and thereupon the commissioners set out the boundaries between the said manors with stones, mounds and other notorious marks.

(a) 1 Burr. 146.

Mr. *Dearden*, on whose title the defendants rested, claimed through Sir *John Byron*.

The boundary thus set out was that of the line of descent of the rain water from the summit of the hills.

1838.

BRISCO

v.

LOMAX

and another.

Coltman, in Michaelmas term, 1836, had obtained a rule nisi for a new trial, on the ground, 1st, that the plaintiff was not at liberty to give evidence of the boundary of Rishworth in a question between Rochdale and Wakefield; and, 2d, that the commission and return were not evidence, the lord of the manor of Wakefield having been no party to it, and he cited *Richards v. Bassett (a)* and *Rogers v. Wood (b)*.

Cresswell (with whom were *Starkie* and *Addison*) now shewed cause. The issue raised on this record was as to the boundary of the manor of Rochdale. It was competent therefore to the plaintiff to shew what that boundary was. He was not compelled to commence tracing out the boundary at the spot where the disputed tract lay. It was proved that the manor of Rishworth was a subinfeudation of the manor of Wakefield, but putting that out of the question, the boundary of Rochdale being in dispute, the plaintiff had a right to shew what the boundary of Rochdale was as related to Rishworth, and if that boundary were a natural one marked by the ridge of hills which continued on towards Wakefield, the inference arose that this was the boundary of Rochdale as related to Wakefield also. If the plaintiff had proved a perambulation of Rochdale by the lord of the manor, it would not have been compulsory on him to commence at the locus in quo; but what difference is there between that evidence which is the admission of the lord and a perambulation of Rishworth, which is adverse and admitted by the lord? It is not contended that the natural boundary could be followed beyond the limits of the manor of Rochdale, where the lord would have no interest to guard against encroachments; but in this case Rish-

First point :
On a question as to the boundary of a manor including the locus in quo, the boundary of the manor in a different part from the locus in quo may be proved.

(a) 10 B. & C. 657.

(b) 2 B. & Ad. 245.

1838.

Brisco

v.

LOMAX
and another.

worth was a subinfeudation of the manor of Wakefield, and therefore the question, which was raised in argument, in *Stanley v. White* (a), does not arise, viz. that there is no connection shewn between the boundaries of Rishworth and Wakefield.

Second point:
A commission from the Duchy Court of Lancaster to ascertain the boundary of the manors of Rochdale and Rishworth, and the return thereto, receivable.

II. The commission and return were receivable in evidence, Mr. Dearden being privy in estate with Sir John Byron. In a case tried at Durham as to a modus in the parish of Cockermouth, the principal evidence consisted in some depositions in a suit in the Ecclesiastical Court, 200 years previously, between the vicar and one of his parishioners; the libel and answer could not be found, but the depositions were received, on the ground of the suit being substantially between the same parties. *Richards v. Bassett* (b) is wholly distinguishable from the present case; there a mere private right was in issue, and it was held that a presentment of the homage as to the wastes of the manor was not receivable. This must have been on the ground that reputation was not receivable, for otherwise the declarations of the homage would have been receivable as evidence of reputation. But *Nicholls v. Parker* (c) establishes the rule that reputation is evidence as to the boundary between manors. [Patteson J. In *Richards v. Bassett* (b), the chief ground of decision was, that it was *post litem motam*.] There was no *lis mota* in this case. The proceedings were gone into with consent of the parties. At all events it was not the present *lis*, and verdicts which are admissible as reputation, (*Reed v. Jackson* (d),) must always be *post litem motam*. Besides, both these manors were parcel of the duchy of Lancaster, the crown therefore was interested in them. [Coleridge J. Putting the consent of the parties out of the question, it is competent to the Court of Chancery to issue commissions to ascertain the boundaries of manors. In 1 *Maddock's Principles and Practice of the Court of Chancery*, it is laid down that

(a) 14 East, 332.

(c) 14 East, 331, n.

(b) 10 B. & C. 657.

(d) 1 East, 355.

"the granting of commissions to ascertain boundaries is a very ancient branch of equitable jurisdiction." The learned baron appears to have admitted the document as in the nature of a verdict.]

1838.

 BRISCO
 v.
 LOMAX
 and another.

Starkie, on the same side, was stopped by the Court.

Alexander and Tomlinson, contra. The issue raised by First point. the third plea is not as to the whole of the boundary of Rochdale, but only as to so much of it as is connected with the locus in quo. The plaintiff therefore was not entitled to go to a distant part of the manor quite unconnected with the dispute. II. Even if evidence was admissible as to the boundary between Rishworth and Rochdale, the commission was not admissible on several grounds. Second point. First, all the proceedings on which the commission issued were between different parties, namely, the lords of Rishworth and Rochdale; and even between them it would not have been evidence, for it was not a final proceeding. The object of the two lords was to obtain a decree, which never appears to have been made. If a decree had been obtained, it would not have been evidence against the plaintiff, *Doe v. Earl of Derby* (a); and therefore cannot be evidence for him. *Richards v. Bassett* (b), also shews that an imperfect instrument like this is not receivable. Secondly, that case also shews that the document was not receivable as an award, as there clearly was no submission, or if there were, there is no rule of Court to make it binding, which exposes the document to the objection already urged. Third, the commission is not receivable, because, as in *Richards v. Bassett* (b), it was *post litem motam*. [*Patteson*, J. The answer to that is, that it is not tendered as evidence of reputation; suppose an action were brought and tried between *A.* and *B.* touching a right that came in issue in another suit between *C.* and *D.*, no doubt that verdict and judgment would be evidence, but not as reputa-

(a) 1 A. & E. 783.

(b) 10 B. & C. 657.

1838.

 BRISCO
 v.
 LOMAX
 and another.

tion, because reputation must proceed from some person conversant with the fact, whereas the judgment is the judgment of the Court.] In that case the judgment would be as it were *in rem*. Here a jury are brought from the body of the county of York, who have no knowledge whatever on the subject, and therefore any verdict or declaration of their's is deprived of any weight which it would be entitled to if they had any personal knowledge of the matter. In *Rogers v. Wood* (a), where a document, purporting to be the decree of the Lord High Treasurer and other officers, was sought to be put in as evidence of reputation, Lord *Tenterden* C. J., in giving the judgment of the Court, held it to be inadmissible, because "declarations can only be evidence when made by those who have personal knowledge of the fact." The high officers who formed the Court in that case had more opportunity of informing themselves of the facts on which the decree proceeded than jurors summoned from the county at large. The rule as to what evidence is receivable *post litem motam*, has been modified since the case of *Nicholls v. Parker* (b), where the declarations of old persons were received as to the boundary between two manors, although the boundary was in dispute at the time. In *Rex v. Cotton* (c) and the case of *The Berkeley Peerage* (d), a different rule prevailed. It was there held that *lis mota* did not mean merely the commencement of the law suit, but the time when the dispute actually arose. The rule laid down in 1 *Phill.* on Ev. 229, (6th ed.) is as follows:—"If declarations are made on a subject in dispute after the commencement of a suit, or after a controversy preparatory to one, they ought not to be received in evidence." Mr. *Phillips* adds, that the same rule applies equally to depositions relating to manorial customs, although if a different custom is contested in two different suits, as in *Freeman v. Phillips* (e), the depositions in the former are not

(a) 2 B. & Ad. 245.

(b) 14 East, 331, n.

(c) 3 Camp. 444.

(d) 4 Camp. 401.

(e) 4 M. & S. 486.

considered as made *post litem motam*. The little value of evidence of reputation was very forcibly urged by Lord *Ellenborough* C. J., in *Weeks v. Sparke* (a), but it amounts to nothing when it dates after controversies have sprung up. It may be said that the commission is tendered more as a verdict quâ reputation, than as reputation. But there is no proof that the verdict was ever acquiesced in; there is no judgment or decree founded on it. It is therefore more like a verdict on a feigned issue. The rule as to the admissibility of a verdict is thus laid down in 4 *Bull. N. P.* 234:—"A verdict will not be admitted in evidence without likewise producing a copy of the judgment founded upon it, because it may happen that the judgment was arrested or a new trial granted; but this rule does not hold in the case of a verdict on an issue directed out of the Court of Chancery, because it is not usual to enter up judgment in such case; and the decree of the Court of Chancery is equally proof that the verdict was satisfactory and stands in force." That passage shews the decree ought to have been produced. *Tooker v. The Duke of Beaufort* (b), on the authority of which this document was admitted, is very loosely reported, and the proceedings there appear to have been final.

1838.

 BRISCO
 v.
 LOMAX
 and another.

LITLEDALE J. (c)—On the question whether this commission and return were admissible in evidence, the case of *Tooker v. Duke of Beaufort* (b), on the authority of which the learned baron admitted it, is very much in point. It is always competent to the Court of Chancery to issue commissions to ascertain the boundaries of manors: it therefore must also be competent to the Duchy Court of Lancaster, when the manors are within that duchy. This commission appears to have been so issued; and an inquisition was thereupon held upon it by the sheriff of York and a jury of that county. It is true that it does not appear to have been

(a) 1 M. & S. 679.

(b) 1 Burr. 146.

(c) Lord Denman C.J. was absent.

1838.
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 BRISCO  
 v.  
 LOMAX  
 and another.

followed up by any decree of the Duchy Court, which perhaps ought to be the case to make it *conclusive* between the parties. But I think it was evidence between the lords of the manors of Rishworth and Rochdale; and if evidence as between them, it was also evidence between the lords of Wakefield and Rochdale. I do not put it on the ground of reputation simply, but it bears this analogy, that where reputation is evidence, a verdict is admissible. Now, as to boundaries of manors, it is clear that reputation is admissible; and in *Reed v. Jackson* (a), where a verdict was admitted as evidence to negative a right of way, *Lawrence J.* said,—“Reputation would have been evidence as to the right of way in this case, *à fortiori* therefore the finding of twelve men upon their oath.” But it is objected that, as in the analogous case of reputation, the evidence was inadmissible, because there was a *lis mota*, which induces parties to make declarations under a bias, and that in like manner the witnesses, on whose testimony the verdict is founded, must be influenced. This, however, was not a case in which there were any suits or *lis mota*. It appears from the commission, that it issued in order to prevent any thing of the kind occurring. I therefore think that it was admissible, on an issue as to boundary between Rochdale and Rishworth.

First point.

If then the boundary between these two manors is shewn to be a natural boundary, and a question arises as to the boundary of one of these manors and an adjoining one, I think the evidence was admissible to enable the jury to say whether a continuation of that natural boundary, proved to exist between the two former, is not the boundary also between the two latter manors. On any question whether a piece of waste land belongs to the adjoining field, evidence is admissible to shew what has been done all along the neighbouring boundary of the waste. This principle has been perhaps extended in a late case in the Common Pleas (b); but it clearly operates here to permit the following

(a) 1 East, 355.

(b) *Doe v. Kemp*, 7 Bing. 332.

of the boundary line of Rochdale; and whether that boundary was continued on in the same line as indicated by a natural division, is a question for the jury.

1838.

Brisco

v.

Lomax  
and another.

PATTESON J.—The first question is, whether evidence was receivable as to the boundary between Rishworth and Rochdale. The admissibility cannot be put on the ground of Rishworth having been once a part of the manor of Wakefield, because the evidence applied to a time subsequent to the subinfeudation. But it was in evidence that the manor of Rishworth abutted on Rochdale; and it is difficult to say on what ground evidence of the boundary of Rochdale in that direction can be excluded. The question was well illustrated by the instance of a perambulation; if that had been attempted to be shewn, it would have been competent to the parties to prove it, by commencing at any spot of the boundary of Rochdale. I therefore think the plaintiff was at liberty to commence where he chose with the boundary of Rochdale, continuing it up to the locus in quo.

First point.

The second question is more difficult; but it is nearly impossible to distinguish this case from *Tooker v. The Duke of Beaufort* (a). It is difficult to say that this commission was admissible as reputation, because the freeholders, being drawn at large from the county of York, could have no personal knowledge of the subject; but that objection would apply to all verdicts. The verdicts are not by themselves evidence of reputation; but where reputation is admissible in evidence, verdicts are also. This perhaps can hardly be taken to be a verdict between the parties interested, but I think it is a record of proceedings of such a public nature as makes it admissible, on the authority of *Tooker v. Duke of Beaufort* (a).

Second point.

COLERIDGE J.—I am of the same opinion. It is a fallacy to contend that because the issue was as to the boun-

First point.

(a) 1 Burr. 146.

1838.  
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 BRISCO
 v.
 LOMAX
 and another.

dary between Rochdale and Wakefield, the boundary between Rochdale and Rishworth could not come in question. Some facts are tendered with a view of proving directly the matter in issue; others as ancillary thereto; but any ancillary facts are admissible in proof, which tend to prove the main issue. In a late case in this Court, the issue was as to the boundary of a tenement; but when it was proved that the boundary in question was identical with the boundary of a hamlet, we held that reputation as to the latter was receivable (a). So in this case, if light could be thrown on the question as to boundary between Rochdale and Wakefield, by shewing what the boundary was between Rochdale and Rishworth, it would be admissible. Many cases may be put, in which the greatest assistance would be obtained from such evidence. Suppose an arm of the sea divided the manors of A. and B., and the boundary between A. and C., an adjoining manor to B., were in question,—if it were shewn that the same arm of the sea continued between A. and C., it might render it in the highest degree improbable that any other boundary existed. So also in the present case, the direction of natural boundary along the ridge of hills, might afford the jury the strongest reason for supposing that it separated Rochdale from Wakefield as well as from Rishworth.

Second point. Assuming then the first point, that it was competent to prove the collateral fact as to the boundary between Rochdale and Rishworth, was the evidence to prove that fact rightly admitted? The document tendered was a commission issuing from the Duchy Court of Lancaster. There can be no doubt that reputation is admissible to prove the boundaries of manors, and that verdicts are evidence where reputation is admissible. This observation disposes of *Doe v. Earl of Derby* (b), for in all cases of tolls, highways, customs, &c., where verdicts are admissible, the verdicts have been between third parties, and no question of recipi-

(a) *Thomas v. Jenkins*, 1 N. & P. 587. (b) 1 A. & E. 783.

city could arise. The objection made of there having been no decree, would apply if the verdict had been put in as conclusive between the parties, but it is only put in as a verdict in a case where reputation is admissible. The remaining question is,—does it amount to a verdict, or is it only the unauthorized declaration of a number of men having no jurisdiction on the subject? When I look at the terms of the commission, and the power which the Court of Chancery has to issue these commissions, I think it must be taken as the proceedings of a court having competent jurisdiction over the subject-matter; and if so, it was receivable as relevant to the issue, and as a verdict in a case where reputation is receivable.

1838.
BRISCO
v.
LOMAX
and another.

Rule discharged,

ROUTLEDGE v. RAMSAY.

Saturday,
May 5th.

ASSUMPSIT on a promissory note for goods sold and delivered, and on an account stated. Pleas: 1. Statute of Limitations; 2. Payment in accord and satisfaction. At the trial at the Cumberland Summer Assizes, 1836, before *Cole-ridge J.*, the plaintiff put in a promissory note of the defendant for 40*l.* dated 7th January, 1828, and relied upon the following acknowledgment to take the case out of the statute, which

[*After enumerating debts due from persons named to the defendant, amounting to 47*l.* 14*s.* 7*d.**] concluded thus:

“*Mr. Jos. Routledge.*—I give the above accounts to you, so you must collect them and pay yourself, and you and me will be clear.


John Ramsay.”

It was contended for the defendant, that this was only a conditional acknowledgment, and therefore not sufficient

knowledge of the debt, no general promise to pay could be inferred from it, but merely a promise to pay in one particular manner.

Semble. Per *Patteson J.*—A promise to pay may be inferred from a general acknowledgment.

The defendant, on application for payment of a debt, handed over to the plaintiff certain book debts due to himself, with the following acknowledgment in writing:—“I give the above accounts to you; so you must collect them, and you and me will be clear.”—Held, that this was no bar to the Statute of Limitations, for, though an ac-

1838.

 ROUTLEDGE
 v.
 RAMSAY.

to support the issue on the first plea. The learned judge reserved the point, and a verdict was found for the plaintiff.

W. H. Watson having obtained a rule nisi for a nonsuit in the ensuing Michaelmas term, on the authority of *Whippy v. Hillary (a)*,

Knowles now shewed cause. The question is, whether the letter of the defendant was not an unconditional acknowledgment of the debt. The rule of law is, that when a debt is established against the defendant, any general evidence of an acknowledgment of a debt is sufficient to bar the statute. In *Baillie v. Lord Inchiquin (b)*, Lord *Kenyon* held the following letter of a defendant, in answer to an application for payment, to be a sufficient acknowledgment :

"I received your letter, and beg to refer you to my trustee, Mr. *H. Wall*, of Paper Buildings, on this complicated business. I should be glad to be informed how you have settled it with Lord *Cork*."

The principle of that decision is, that when there is a general acknowledgment of the debt, the law implies a promise to pay. If in the acknowledgment there is only a conditional promise to pay, then another rule prevails, viz. that there is no room for inferring a general promise, where the parties have themselves expressed a conditional one, on the principle of *expressum cessare facit tacitum*. This was the ground of the decision in *Tanner v. Smart (c)*. The present case is clearly a general acknowledgment, with no condition annexed or implied. The defendant hands over his book debts to the plaintiff, and tells him to pay himself, which is equivalent to saying "there is so much money of mine lying at the bankers, and here is an authority to draw it out." It cannot be contended that the latter case is a conditional acknowledgment, but wherein does it differ from the present? *Whippy v. Hillary (a)*, which was cited for the rule nisi, has no analogy with the present case. The acknowledgment there did not make the defendant chargeable, but

(a) 3 B. & Ad. 899.

(b) 1 Esp. 435.

(c) 2 M. & R. 96; 6 B. & C. 603.

the trustee, to whom it referred for payment. In this case, no other person than the defendant is referred to, and the whole effect of the letter is to acknowledge the debt generally, and to designate a fund out of which it may be paid. It would be a very forced construction in favour of the defendant, and of debtors, to say, that he only agreed to pay, if the plaintiff collected the debts. In *Dodson v. Mackay* (a), where there was a general acknowledgment of the debt, but a term referring to a contingency for payment, this Court held, that it was not a conditional acknowledgment, although the Court granted a rule on another point. [Lord Denman C. J. We granted a rule for the purpose of considering *Dickinson v. Hatfield* (b), in which Lord Tenterden C. J. held, that a general acknowledgment, without specifying the amount of the debt, is not sufficient. The rule was not afterwards brought on; but in the subsequent case of *Lechmere v. Fletcher* (c), it was decided that the amount might be supplied by parol evidence.] In *Dabbs v. Humphries* (d) the question of a conditional acknowledgment was discussed, and though the case is not quite in point, it serves to shew that it is not because an acknowledgment refers to a particular mode of payment, that it is to be held conditional.

W. H. Watson contra, was not called upon by the Court.

LORD DENMAN C. J.—*Whippy v. Hillary* (e) is expressly in point here. In all the cases of this kind there has been an acknowledgment of the debt, and the question has been, whether such an acknowledgment amounts to a promise to pay. In this case the defendant makes no such promise, but hands the plaintiff over a parcel of debts, which he says will make him clear. That clearly is only an offer to pay in a particular manner. With regard to *Baillie v. Lord Inchiquin* (f), where the defendant's letter referring for payment to his trustee, was held a sufficient acknowledgment,

(a) 4 N. & M. 327.

(b) 5 C. & P. 46.

(c) 1 C. & M. 623.

(d) 10 Bing. 446.

(e) 3 B. & Ad. 399.

(f) 1 Esp. 435.

1838.

ROUTLEDGE

v.

RAMSAY.

it must be taken to be expressly overruled by *Whippy v. Hillary* (a).

LITLEDALE J.—I am of the same opinion. This letter, no doubt, is so far an acknowledgment, that it does not deny the debt—but it is not every acknowledgment that amounts to a promise. All that the letter does is to admit the debt, and to state “you may pay yourself out of these accounts, if you can?”

PATTESON J.—I do not mean to say that a general acknowledgment of a debt, without *more*, may not raise a promise to pay now, as it did before the late statute (b). But whenever any thing *more* is added to the acknowledgment, it must be taken into consideration. More is added here, and on examination it clearly appears that the defendant only intended to pay the debt out of the accounts he handed over, and not to make himself generally chargeable: it is therefore quite within *Whippy v. Hillary* (a). I am not aware whether, in that case, *Baillie v. Lord Inchiquin* (c) was brought before the notice of the Court, but it must be recollected, that *Baillie v. Lord Inchiquin* was before Lord Tenterden's act.

COLERIDGE J.—It must be admitted, that an acknowledgment of a debt does not amount to a promise to pay, but is only evidence from which it may be inferred. The whole acknowledgment, therefore, must be looked at, and this brings the case within *Whippy v. Hillary* (a). There the defendant referred for payment to the trustee, in whose hands his affairs were placed; in this case the defendant handed over certain accounts, out of which the plaintiff was to pay himself, but it is evident that in neither instance did the defendant intend to charge himself generally.

Rule absolute.

(a) 3 B. & Ad. 399.

(c) 1 Esp. 435.

(b) 9 Geo. 4, c. 14.

1838.

Monday,
May 7th.

The QUEEN v. TOKE, Clerk, and another.

E. PERRY, in Hilary term last, had obtained a rule, calling upon the defendants to shew cause why a certiorari should not be granted to remove the following order into this Court:

"County of Kent, } The order of the Rev. *Nicholas Toke*, Clerk,
to wit. } and *George Edward Sayer*, Esq., two of her Majesty's justices of the peace in and for the said county, one whereof is of the quorum, made at a petty sessions held at &c., in the said county, on Saturday, the 2d day of December, A.D. 1837. Upon an application to us the said justices, at the said petty sessions, by the churchwardens and overseers of the poor of the parish of *Mersham*, in the county of *Kent*, to have an order made on *Thomas Gilbert*, of the parish of *Mersham*, in the said county, woolsorter, for him to maintain his father, *James Gilbert*, who is poor and unable to work, so as to maintain and support himself, and chargeable to the said parish of *Mersham*, he the said *Thomas Gilbert* being a person of sufficient ability to maintain and provide for his said father; and the said *Thomas Gilbert* having been duly summoned to appear before us the said justices, at the said petty sessions, to the end that we might examine into the case and circumstances of the premises, and now appearing before us the said justices, in pursuance of the said summons, he has not shewn why such order should not be made; and we having heard the parties so complaining, and duly considering the circumstances of the said complaint, as well as the want of any adequate defence on the part of the said *Thomas Gilbert*, do adjudge and determine that the said *James Gilbert* is poor and unable to work, so as to maintain and support himself, and actually chargeable to the said parish of *Mersham*; and that the said *Thomas Gilbert* is a person of sufficient ability to maintain and provide for his said father, and therefore we order that the said *Thomas Gilbert* shall and do forthwith, upon notice of this our order, pay, or cause to be paid, to the churchwardens and overseers of the poor of the said parish of *Mersham* for the time being, or to some or one of them, weekly, from this present time, the sum of two shillings and sixpence, for and towards the sustentation, relief, maintenance and support of the said *James Gilbert*, for and during so long time as the said *James Gilbert* shall be chargeable to the said parish of *Mersham*, or until the said *Thomas Gilbert* shall be legally directed to the contrary."

An order of two justices of the county of K., after reciting that upon application by the churchwardens and overseers of the parish of M., in the county of K., to have an order made on T. G., of the parish of M., in the same county, to maintain his father; and that the said T. G. had appeared, adjudicated that the father was unable to support himself; and that the said T. G. was a person of sufficient ability &c., and then proceeded to order that "the said T. G." should pay a weekly sum:—Held, per *Patteson* and *Coltridge* Js., (*Littledeale J. dubitante*) that it sufficiently appeared that T. G. was dwelling within the jurisdiction of the justices, as the words "of the parish of

Deedes now shewed cause. This is an order of justices,

M., used by the churchwardens, signified that he dwelt there, and the justices had adopted those words, and so adjudicated that he there dwelt, by making their order upon "the said T. G."

1838.

 The QUEEN
 v.
 TOKE
 and another.

made under the 59 *Geo.* 3, c. 12, s. 26, which is an extension of the powers, given by 43 *Eliz.* c. 2, s. 7 to justices at their general quarter sessions, to justices in petty sessions. The 43 *Eliz.* c. 2, enacts that the parents or children of poor persons, unable to work, being of sufficient ability, "shall at their own charges relieve and maintain every such poor person, in that manner, and according to that rate, as by the justices of the peace of that county, where such sufficient persons *dwell*, shall be assessed." The principal objection relied upon against this order is, that it does not appear that *Thomas Gilbert*, upon whom it is made, dwells within the jurisdiction of the justices. But this is an order, and not a conviction, and the rule is, that every intendment will be made in favour of an order; *Rex v. Bisser* (a), *Rex v. Middlehurst* (b), and *Rex v. Lloyd* (c). *Thomas Gilbert* is stated to be *of* the parish of Mersham, in the county of Kent; the word "*of*" in its ordinary sense would signify that he is there resident. In affidavits, where the residence of the deponent is required to be given, "*of*" is the term used to denote residence (d). [*Coleridge J.* Supposing that the description "*of Mersham*" denotes dwelling there, the order contains no adjudication that he dwells there.] That is not necessary, if it appear in any part of the order that the case is within the jurisdiction of the justices. In order to give justices jurisdiction under the old law, to make an order in bastardy, it was necessary that it should appear where the child was born; but in *Rex v. Fox*, which was cited by Lord *Kenyon C. J.*, in *Rex v. Price* (e), it was held that the place of birth need not be contained in the adjudication, and that an order in these terms sufficiently shewed where the child was born: "The order of us *L.* and *D.*, two justices &c., residing near to the parish of H., con-

(a) 1 Burn's Just. Distress, S. V.

(b) 1 Burr. 309.

(c) 2 Str. 996.

(d) By the rule of Mich. 15 Car. 2, "it is ordered that the true place of abode, and the true addi-

tion of every person who shall make affidavit in Court here, shall be inserted in such affidavit." See Rule Hil. 2 Will. 4, no. 5; and *Vassier v. Alderson*, 3 M. & Sel. 165.

(e) 6 T. R. 147.

cerning a bastard child of *E. G.*, born in the said parish of H." [*Coleridge J.* That order sets out the words of the justices themselves.] So it is submitted does the order here. [*Coleridge J.* Suppose that there was no adjudication that the pauper was unable to work, and that that fact only appeared from the recital, do you contend that the order would be sufficient.] It is submitted that it would, if the fact appears on the face of the order. The case of *Rex v. Woodford* (a) was cited, when this rule was obtained, to shew that the person on whom the order was made must dwell within the jurisdiction of the justices. In that case the order was held bad, but the form of it does not appear from the report. In *The King v. Reeve* (b), which was also cited, no form of order appears. It appears by the precedents in the books (c), that the form of order in this case has been used for a long period of years.

1838.

 The QUEEN
 v.
 TOKE
 and another.

E. Perry, contra. Two points are relied upon—1st. That the order should adjudicate that *Gilbert* dwelt within the jurisdiction of the justices; and 2d. That it does not appear in any part of the order that *Gilbert* did dwell within the county.

I. The case of *Rex v. Fox* (d), which has been cited for the first point, is distinguishable. The language of the order there reciting that the child was born in the parish of H., is the language of the justices; in the present order, the description of *Gilbert* is a mere recital of the application of the churchwardens. The order, too, in *Rex v. Fox* (d), was an order in bastardy, as to which there has always been a greater laxity than as to other orders, of which *Rex v. Venables* (e) is an example, where it was held that it need not appear on the face of the order that the defendant had been summoned. *Day v. King* (f) appears to be an express authority that the recital of a fact which is necessary

(a) 1 Const's Bott, pl. 460.

(b) 2 Bulstr. 344.

(c) 1 Chitty's Burn's J. P. 985.

(28th ed.)

(d) Cited in 6 T. R. 148.

(e) 2 Lord Raym. 1405:

(f) 5 A. & E. 359.

1838.

The QUEEN
v.
TOMK
and another.

to give jurisdiction is not sufficient, but that it should be stated in the adjudication. It has been said, that not even the fact of the pauper being unable to work need be stated in the adjudication, but *Rex v. Pennoyer* (a) is a direct authority to the contrary.

II. But supposing it to be unnecessary in this case for the fact to be so stated, *Gilbert's* dwelling in the county does not appear in the order at all. It is not true that every intendment is to be made in favour of an order. The correct rule to be drawn from the cases is, that where the jurisdiction of the justices appears on the face of the order, the Court will put a liberal construction on the terms in which the order is couched. No case is to be found in which intendment has been made of a fact necessary to give jurisdiction. On this order it was necessary that *Gilbert's* dwelling within the county should appear distinctly. But to describe a person of — does not denote distinctly that he resides at —, either in colloquial or legal language. In indictments, — of —, does not mean residence; in writs of summons it does not mean residence, properly so called, for if a person be described in the writ as — of —, setting out his office or place of business, which may be distinct from his residence, is sufficient (b). If — of — denotes residence in affidavits, it is because the statute requires the residence of a deponent to be stated, and the party adopts that form of language to describe his residence, but neither in affidavits nor in writs of summons is the *dwelling* required under this statute necessary to be shewn. It is not denied that the expression “of such a place,” may mean residing there; but it has various other meanings, and the fact which gives jurisdiction to justices, ought not to be stated ambiguously. *The King v. Reere* (c) is a distinct authority on the subject. There, a party who resided at Eye, in Suffolk, had come up to London for a few days, on business, and whilst in London he refused to obey an order made upon him by

(a) 1 Const's Bott, 365, pl. 459.

(c) 2 Bulstr. 344.

(b) See *Yardley v. Jones*, 4 Dow, P. C. 45.

the Middlesex magistrates to maintain his grandchild; the Court held that the Suffolk sessions only had jurisdiction in the matter. The order in that case is not set out, but if the party were described as *of* the place where he was lodging, within the jurisdiction of the Middlesex justices, as he might well be, the decision shews that such an order is bad, because jurisdiction does not arise by a party residing for a day or two within the county. If then the term "of such a place" be a good description of a person, being there for a day, or of his being connected with it by his place of business, or by his birth, or by any other relation, how can the Court shut their eyes to all these meanings, and say that in this order it means residence only. Where intendments have been made in favour of orders, there has never been any doubt as to the fact intended, but what is there to induce the Court to believe that *Thomas Gilbert* had any thing more than a warehouse at *Mersham*?

1838.

The QUEEN
v.
TONE
and another.

LITTLEDALE J.(a)—In *Comyns' Digest*, Abatement, (F 25), many cases are given, in which the word "of" may be used to signify a person's addition of place, although it would not necessarily denote that he resided there. This order was made under the 59 *Geo. 3*, c. 12, s. 26, which extends to justices at petty sessions the jurisdiction given, by the aforesaid statute of *Elizabeth*, to them at quarter sessions. Jurisdiction is given to two or more justices of the peace, "for the county or jurisdiction in which such sufficient person shall dwell;" and the objection to this order is, that it does not sufficiently appear that the party on whom it is made was dwelling within the county, so as to give the justices jurisdiction. I confess I have doubts whether this objection is not good, but my brothers are against the objection, and my doubts are not strong enough to induce me to dissent from their opinion. Complaint is made to the justices against "*T. G. of Mersham, &c.*" and they make an order upon the *said T. G.*, and if the justices

(a) Lord Denman C.J. was at the Privy Council.

1838.

 The QUEEN
 v.
 TOKE
 and another.

thereby adopt the description given to *T. G.* by the complaining parties, it may be taken that there is an adjudication that *T. G.* was dwelling within the county; although I should say the word "said" perhaps goes no farther than to make out the identity of the party. In *2 Nolan's Poor Law (a)*, it is said, that the order of maintenance must state that the person upon whom it is made lives within the jurisdiction of the justices who make it, and *Rex v. Woodford (b)* is cited as an authority. In that case the order was bad, but the form of it is not given. Altogether I must own I am not without doubt on this question.

PATTESON J.—I had some doubt during the argument, but am now satisfied that this order is good. Although the word "of" has various significations, it is very commonly used to signify a person's dwelling-place. Then the word "of" having this meaning, are we to take it as having been used by the justices, or merely by the churchwardens? If it is used by the churchwardens only, then we must be driven to intendment, which I would rather avoid, to support this order. But I am of opinion, without any intendment whatever, that the justices themselves may be considered to have adopted the description given by the churchwardens of the party on whom they make the order.

COLERIDGE J.—I think that the rule of construction stated by Mr. *Perry* is correct, and that, whether in the case of orders or convictions, it is the duty of this Court to see that the justices do not act without jurisdiction. But when once their jurisdiction appears, the language in which facts are stated by them should be construed fairly and candidly, and supported by reasonable intendment. Here the question is, with reference to their jurisdiction, whether the word "of" sufficiently indicates the place of the party's abode, on whom they have made their order; I think it does. The

(a) C. 30, s. 4, p. 364, (4th ed.)

(b) 1 Const's Bott, pl. 460.

word then being sufficient in itself, have the justices employed it? On reading through the order, I think it appears that they have adopted, as their own, the word used in the first instance by the churchwardens, and have in fact adjudicated upon *T. G.*'s residence. The case of *Day v. King* (a) is distinguishable. The order in that case set forth the evidence of a number of facts, the existence of which was necessary in order to give the justices jurisdiction, but the adjudication did not decide that they had any existence.

Rule discharged (b).

Deedes then applied for costs of the rule, being as against magistrates.

Sed per Curiam.—No, it is a very slovenly order.

(a) 5 Ad. & El. 359. (b) See *Rex v. Cornish*, 4 B. & Ad. 498.

MARY LANT v. PEACE.

Tuesday,
May 8th.

COVENANT on an indenture of mortgage dated 5th April, 1837. At the trial at the last Warwick assizes, before *Park J.*, the deed on which the action was brought recited the transfer of an original mortgage for 400*l.* from one *Weaman Lant* to the plaintiff, the original mortgage having been executed by the defendant and another person to *Weaman Lant* for that sum, and that the plaintiff had agreed to advance to the defendant the further sum of 1000*l.*, to secure which, and for further securing the said sum of 400*l.*, the defendant mortgaged certain premises, different from the premises conveyed in the mortgage of the 400*l.* This deed of 1837 was stamped with the following stamps:

The 1st skin, 5*l.*, as *ad valorem* duty for 1000*l.*, and

Also a 1*l.* 15*s.* in respect of the deed operating as a further security for the 400*l.*

An instrument operating as a further security for a sum, on which the *ad valorem* duty has been paid, and also as a security for an additional sum advanced, is not exempted from any other duty with regard to its operation as a further security under 55 Geo. 3, c. 184, Sched. tit. "Mortgage," than the *ad valorem* duty.

1838.

LANT
v.
PEACE.

The 2nd, 3rd and 4th skins had each a 1*l.* stamp.

The original mortgage deed for 400*l.* and assignment, properly stamped, were also produced.

At the trial it was discovered, that the deed on which the action was brought contained too many words for the stamps impressed upon it. The plaintiff, however, contended that the deed-stamp of 1*l.* 15*s.* was unnecessary, and that it might be applied to make up the deficiency in the other stamps. The learned judge directed a verdict for the plaintiff, with permission to the defendant to move to enter a nonsuit.

Whitehurst, on a former day in this term (May 8th), obtained a rule nisi accordingly.

Humfrey now shewed cause. The question is, whether the 1*l.* 15*s.* stamp, which was unnecessarily affixed to this deed, as a deed-stamp on the additional security for 400*l.* may not be applied so as to cover the number of words in the deed. By the 55 *Geo.* 3, c. 184, sched. part I. tit. Mortgage, a mortgage-deed requires an ad valorem duty, according to the sum of money which it is intended to secure, which in this case would be 1400*l.*, but the schedule exempts from the ad valorem duty "any deed or other instrument made as an additional or further security for any sum of money," . . . "already secured by any deed which shall have paid the ad valorem duty hereby charged," . . . "but if any further sum of money shall be added to the principal sum already secured, the said ad valorem duty shall be charged in respect of such further sum." As the ad valorem duty had been paid on the 400*l.*, that stamp was only required in respect of the 1000*l.*, and as the 1*l.* 15*s.* stamp, which was erroneously fixed, is of the same denomination, it may be applied as a progressive duty to cover the total number of words in the deed. The intention of the act was not to impose a duty on the security, but only on the sum actually advanced, and that duty has been paid in the present case. It may be said, that a deed-stamp is required in respect of the 400*l.*, but no provision in the

Stamp Act imposes such a stamp in a case like the present. Where a deed operates as a further security for a sum advanced, and a further sum is advanced, an *ad valorem* duty is required only in respect of the further sum, it not being intended that the *ad valorem* duty should be paid twice. This is elucidated by the 3 *Geo.* 4, c. 117, with respect to the stamp on transfers, it having been found that by the 55 *Geo.* 3, c. 184, a 1*l.* 15*s.* stamp was required on a simple transfer of a mortgage, where no further sum was advanced; but where a further sum was advanced, then the same stamp as on an original mortgage; the 3 *Geo.* 4, c. 117, s. 2, repealed the *ad valorem* and other duties on the transfer of a mortgage, and imposed a 1*l.* 15*s.* stamp on a simple transfer, with 1*l.* 5*s.* progressive duty; and if any further sum should be added to the principal money already secured, the *ad valorem* duty payable upon mortgages should be charged only on the additional sum. It was contended after that act, that in cases where there was a transfer and an additional sum advanced, a transfer stamp was required, as well as an *ad valorem* duty on the additional sum; but in *Doe v. Gray* (a) it was held, that it was sufficient to pay the *ad valorem* duty on the additional sum only. The clause in the 3 *Geo.* 4, c. 117, s. 2, exempting a transfer from any stamp when an additional sum is advanced, is very similar to the clause in 55 *Geo.* 3, c. 184, Sched. part I. tit. Mortgage, which exempts deeds operating as a further security from any stamp. The analogy of that case therefore to the present is very strong; for if, where there is a transfer and an additional sum advanced, an *ad valorem* duty on the latter sum only is required, *à fortiori* no other stamp is required when there is no transfer, and only additional security given. The object of passing the 3 *Geo.* 3, c. 117, appears to have been to assimilate the law as to the stamp duty required on transfers, and on deeds operating as additional security. This view is confirmed by the language of *Tindal C. J.* in *Doe v.*

1838.

LANT
v.
PEACE.

(a) 4 N. & M. 719; 3 A. & E. 89.

1838.

LANT
v.
PEACE.

Maple (a). It was contended there, that the assignment of a mortgage deed, which operated as an additional security, required stamping in that respect. *Tindal* C. J. said, "there is nothing in the act of parliament which requires that the stamp contended for should be fixed to the added security."

Whitehurst contra. The course which was adopted in this case of affixing a deed-stamp to the instrument, was correct, and has been in practice ever since the passing of the Stamp Act. It is now contended that a deed-stamp is unnecessary, and that the stamp may be applied for the progressive duty. But a mortgage deed, as this is, for 400*l*. without a deed stamp, was never heard of. It was never contended by the defendant, that the deed-stamp of 1*l*. 15*s*. could not be applied to the progressive duty, if a deed-stamp was unnecessary, nor was it ever contended that the ad valorem duty must be paid a second time on the 400*l*., but that a deed-stamp is necessary as well as the progressive duty. The act expressly requires that every deed, not expressly exempted, shall pay 1*l*. 15*s*.; this is not exempted. The exception, as to further securities, is expressly by the title of it confined to the *ad valorem* duty; the words are, "exemption from the said ad valorem duty, &c., but not from any other duty to which the same may be liable," and under the title "Deed," in the same schedule, "of any kind whatever not otherwise charged in the schedule, nor expressly exempted from all stamp duty," 1*l*. 15*s*. This further assurance deed is not otherwise charged, nor expressly exempted from all duty, and therefore it required a deed-stamp. In the 55 *Geo.* 3, c. 184, sched. part I. under the title "Mortgage, &c., with a conveyance of the equity of redemption, or other matter in the same Deed," the second clause is as follows: "in all other cases, where a mortgage or other instrument hereby charged with the *ad valorem* duty on mortgages, shall be contained in one and the same deed or

(a) 6 Law Jour. Com. Pl. New Ser. 471; 3 C. 3 Bing. N. C. 832.

writing, with any other matter or thing (except what shall be incident to such mortgage or other instrument), such deed or writing shall be charged with the same duties (except the progressive duty) as such mortgage or other instrument, and such other matter or thing would have been separately charged with, if contained in separate deeds or writings." This clause shews expressly that the same stamps must be upon this mortgage for 1000*l.* and 400*l.* respectively, as if there were two separate instruments. It is true that the *ad valorem* duty on 400*l.*, which had been already paid, is not again to be paid, but that is the only exemption. The 3 *Geo.* 4, c. 117, s. 3, was passed in order to put additional securities for money advanced on *bonds*, on the same footing with deeds, for additional security, under the 55 *Geo.* 4, c. 184, for money advanced on indentures. It was considered hard that such transfers should have to pay the *ad valorem* duty twice, and they were put on exactly the same footing as additional securities for money lent on indentures; but that act expressly provides, that such additional securities shall be charged with the ordinary duty payable on deeds; and if the construction contended for on the part of the plaintiff was correct, they would not be on an equal footing, inasmuch as such deeds would pay the deed-stamp, but an additional security on indentures would not. As to *Doe v. Gray* (a), which has been cited as an authority on the other side, to shew that no deed-stamp is required on a transfer, it proves no such thing. The stamp in that case was sufficient to cover the deed-stamp, and Lord Denman C. J. said, "whether a common deed-stamp also was necessary, under either of the acts, it is not material to inquire, because the 1*l.* 15*s.* stamp, though it may have been *erroneously* put on these deeds, was at all events *sufficient* (b)." The case of *Doe v. Maple*, cited from the Law Journal (c), is not at all applicable; it was only held there that the *ad valorem* duty was not payable twice, which

1838.

 LANT
 v.
 PEACE.

(a) 4 N. & M. 719.

(b) 4 N. & M. 723.

(c) 6 Law Jour. New Ser. C. P. 271; S. C. 3 Bing. 832.

1838.

LANT

v.

PEACE.

is not disputed, and the instrument was stamped with a deed-stamp.

LORD DENMAN C. J.—In this case it is conceded, that sufficient *ad valorem* duty has been paid on this instrument, if the 1*l.* 15*s.* stamp, which was impressed for another purpose, can be taken into account. It is contended that this stamp can be so applied, because in the clause containing exemptions from the *ad valorem* duty on mortgages, &c. there is enumerated, any deed made as an additional or further security, which shall have paid the *ad valorem* duty, which is the case with respect to the 400*l.* But that exemption in the schedule is expressed only to be in respect of the *ad valorem* duty, “but not from any other duty to which the sum may be liable.” A deed-stamp is a duty to which a deed for further security is liable; the argument therefore fails.

LITTLEDALE J. concurred.

PATTESON J.—I feel no doubt upon the question, on looking at the terms of the title of what is called the exempting clause. It professes to exempt certain deeds which have paid the *ad valorem* duty, from payment of that duty only. This deed, with respect to the 400*l.*, comes within the exemption, because the duty had been paid upon that sum; then a further sum of 1000*l.* is advanced, upon which the *ad valorem* duty is payable, and the question is, whether the mortgage stamp paid upon that sum renders any further stamp on the 400*l.* unnecessary. There is nothing in the act to shew that there is any such exemption, and *Doe v. Gray* (a) does not touch the question, for that case depended entirely on the peculiar words of 5 *Geo.* 4, c. 117, with respect to the transfer duty, and this point did not arise.

COLERIDGE J. concurred.

Rule absolute.

(a) 4 N. & M. 719.

1838.

DOE, on the several demises of ANN WRIGHT and
ELIZABETH WRIGHT, v. SMITH.

Tuesday,
May 8th.

EJECTMENT for premises in Goswell Street, in the county of Middlesex. At the trial at the sittings in Middlesex, after Hilary term, 1837, before Lord Denman C. J., the lessors of the plaintiff claimed under a devise to them, as tenants in common, by the will of *Elizabeth Taylor*. *Taylor* had granted a lease to the defendant, which was alleged to have been forfeited for breach of covenant. The probate of the will of *Elizabeth Taylor* was produced, and a lease from her to the defendant, dated in 1829, was put in, under the following notice to produce:—

“Take notice, that the plaintiff in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant at our office, on &c., and that the defendant will be required to admit that such of the said documents as are herein specified to be originals were respectively written, signed or executed as they purport respectively to have been; that such as are specified as copies are true copies; saving all just exceptions to their admissibility as evidence in this cause.

(Signed) A. & B. Plaintiff's Agents.”

Description of the Document.	Date.	Original or Duplicate, served, sent or delivered, when, how and by whom.
Counterpart of Lease from <i>Elizabeth Taylor</i> , of Pailton, in the parish of Monks' Kirby, in the county of Warwick, spinster, to the defendant.	26 Dec. 1839.	

Upon a summons before a judge, after both sides had been heard, an order was made upon the defendant to make the above admission.

On the production of the document, it appeared to have

trial, the instrument produced was signed by both parties, and appeared to be a lease, but it only bore a counterpart stamp:—Held, that the defendant was precluded by his admission from taking the objection, as he had had an opportunity of inspecting the document before he made the admission, and ought to have made the objection then.

3. This Court will not allow a party, as a matter of right, to shew cause against a rule in the first instance, although notice has been given to the other side.

1. Where judgment by default passed against a defendant in ejectment, who was the tenant in possession, and a writ of possession issued out; an instrument, signed by him, reciting that possession had not been taken under the judgment at his request, and that the lessor of the plaintiff had devised the premises to A. B., and witnessing that he, the defendant, then attorned tenant to the said A. B., does not require a stamp.

2. A defendant had notice to admit certain documents, one of which was described as the counterpart of a lease, and an order to admit was thereupon made. At the

1838.

DOE

v.

SMITH.

been executed by both parties; and as it only bore a 1*l.* 10*s.* stamp (instead of a 2*l.* stamp, which is required for a lease,) it was contended for the defendant that it was inadmissible in evidence, the document being a lease and not a counterpart. No other lease was proved to be in existence, but the instrument was indorsed "counterpart;" and the plaintiff contended that the defendant was bound by his admission. It did not appear that the defendant had seen the document or the indorsement before the order to admit was made upon him. His lordship overruled the objection. The seisin of Miss *Taylor* having been disputed as to the premises in question, evidence was given of an ejectment having been brought, in 1829, against several defendants, of which the present defendant, *Smith*, was one; that judgment had passed against them by default, and writs of possession had been issued; and the following instrument, which bore no stamp, was put in as an attornment of the defendant:—

"In the King's Bench.

Between *John Doe*, on the demise of *John Banks*, clerk, plaintiff,
AND
Richard Roe, defendant.

Whereas a judgment against the casual ejector in this action of ejectment was obtained in Easter term last past, and I the undersigned, being tenant of the several messuages and tenements, situate &c., do hereby admit that possession thereof hath been stayed and not taken under the said judgment, at my request. And whereas the said *John Banks*, clerk, hath since departed this life, and by his last will and testament devised the said several messuages and tenements, with their appurtenances, unto — *Taylor*, of &c. Now, know all men by these presents, that in consideration of the premises I do hereby attorn tenant to the said — *Taylor* for the said messuages and tenement, with their and every of their appurtenances, and which are now in my possession, and have this day paid to *Francis Rowlatt*, of &c., the agent of the said — *Taylor*, the sum of one shilling upon that attornment, on account and in part of the rent due and to become due from me, for and in respect of the said premises. And I do become tenant thereof to the said — *Taylor* from the 29th day of September last past. As witness my hand this 4th day of December, 1829.

W. Smith."

It was objected that this instrument was inadmissible

for want of a stamp; but his lordship overruled the objection on the authority of *Doe v. Edwards*(a), giving the defendant leave to move to enter a nonsuit on both points, if the Court should be of a different opinion.

1838.

 DOE
 v.
 SMITH.

Sir *W. W. Follett*, in the Easter term following(b), moved accordingly. He contended, first, that the defendant, by his admission, only agreed to admit the counterpart of a lease, and not a lease, which this instrument turned out to be. Secondly, the instrument produced as an attornment required a stamp. It is true that an attornment requires no stamp; but this instrument was an agreement to become tenant to *Taylor*, and not a mere attornment. In *Cornish v. Searell*(c), *Holroyd J.* gave the definition of an attornment:—"When the original landlord parts with his estate, and transfers it to another, and the tenant consents to hold of that other, the tenant is said to attorn to the new landlord. The attornment is the act of the tenant's putting one person in the place of another as his landlord." In this case the landlord had the right to turn out the defendant; instead of doing which, he admits him as tenant: but that is not an attornment(d). [*Coleridge J.* There are some cases where an instrument operates both as an attornment and an acknowledgment of title, and it has been held that no stamp is necessary. Does this instrument do more than admit title?] Yes; it creates an interest.

Manning, for the plaintiff, claimed a right to shew cause in the first instance, if a rule should be granted, notice having been given to the defendant to that effect; and he cited 1 *Tidd*, Pr. 499 (9th ed.)

(a) 6 N. & M. 633.

(c) 8 B. & C. 471; S. C. 1 Man.

(b) Saturday, April 15th, before Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

& Ryl. 703.

(d) See *Doe v. Boulter*, 1 N. & P. 650.

1838.

DOE
v.
SMITH.

Lord DENMAN C.J.—We do not think you are entitled to do so,

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in that term, intimated that the Court was of opinion there should be a rule on the former point, but not on the latter, as they thought no stamp was necessary to the instrument.

Erle and *Manning* now shewed cause. The point remaining for argument is very short. If this instrument were a lease, it would require a 2*l.* stamp; if a counterpart or a duplicate, the stamp it bore was sufficient; 55 *Geo.* 3, c. 184, sched. part 1, Lease. This instrument was produced as a counterpart, under a judge's order to admit, and it was indorsed as a counterpart. It is laid down by *Litt.* s. 370,—“It is to be understood that if the indenture be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect as all the parts together be.” The signature therefore by the landlord, which it will be contended makes it a lease, was superfluous in respect of that part of the indenture which remained in the custody of the lessor, as was the case with the instrument in question. This indenture being upon the face of it bipartite, and the part produced being in the possession of the lessor, its primary character is that of counterpart. The addition of the execution by the lessor made it also a duplicate, but not the original lease. The original lease belongs, during the term, to the lessee, and must be presumed to be in his possession. In the absence of evidence to that effect, it cannot be presumed, first, that, contrary to the nature of bipartite indentures, one instrument only was executed; and, secondly, that this single instrument was suffered to remain in the possession of the lessor, who would have no right to such possession until the expiration of the term, when indentures of lease belong to the lessor

as part of the muniments of his title: *Co. Litt.* 47 b, 48 a. But here the defendant has admitted that the instrument produced was a counterpart. It was so described in the notice served, and he had an opportunity of ascertaining whether that description was correct. Not having chosen to attend at the office of the plaintiff's attorney, he must be taken to have acquiesced in that description; and the presumption is obvious, that having the original lease in his possession, he was well aware that the document in the plaintiff's possession must be either a counterpart or a duplicate.

1838.

DOE
v.
SMITH.

Sir *W. W. Follett* and *R. V. Richards*, *contra*. The answer to the argument on the other side is, that there was no evidence that this instrument was a counterpart. It appeared on the face of it to be a lease, and no other copy was shewn to have been in existence. [*Coleridge J.* The defendant had agreed to admit this document with "counterpart" indorsed upon it.] There is no evidence that the defendant ever saw that indorsement, and if he had, the indorsement cannot alter the nature of an instrument. The only ground on which doubt can be entertained is, whether the defendant, by his admission, has precluded himself from taking the objection. But all that the notice requires the defendant to admit, is, that such instruments as are described to be originals, and such as are described to be copies, were respectively properly executed. This instrument is not described to be an original, and it turns out to be one. There is no admission therefore on the subject. Suppose the notice had been to admit the copy of a probate, and the instrument produced were not a copy of the probate from the Prerogative Court, but a copy made in an attorney's office,—would the defendant be precluded from taking the objection? It is no answer to say that the defendant had an opportunity of inspecting the instrument. He relied on the plaintiff's statement that he had a counterpart, and agreed to admit it. He then finds that it is

1838.

DOE
v.
SMITH.

not a counterpart. If the notice had called upon the defendant to admit that the document in question was a counterpart, he would then have been bound by it; but the terms of the notice are not to that effect.

LITLEDALE J.—I am of opinion that this rule ought to be discharged. Suppose the Stamp Act were out of the question, it would be sufficient for the landlord to have put in an instrument under the seal of the defendant, and to shew the ground of forfeiture. But the argument is that, as there are stamp acts, it must be seen, for the protection of the revenue, that the instrument produced is properly stamped. Had it not been for the admission in this case, I should have thought the stamp was insufficient, because the Stamp Act mentions three different instruments,—a lease, a counterpart, and a duplicate, with different stamps on the two last from that required for the first. If the instrument be signed by the lessor, it is not a counterpart, but a lease; or if there were proved to be a lease in existence, it is a duplicate. Thus it would have stood if there had not been an admission. Now, suppose in the notice this instrument had been called a duplicate, the defendant would have had an opportunity of inspecting it, and if he had not availed himself of it, he could not object at the trial that it was a lease, and not a duplicate. In this case the deed has been admitted as a counterpart, which it is not strictly; but a counterpart requires the same stamp as a duplicate, and therefore I think, though there has been an inaccuracy in the description, that the defendant is bound by the admission.

PATTERSON J.—At first I had considerable difficulty upon this point. If there had been no notice in this case, it is quite clear that the instrument was inadmissible, as there was no evidence of there being any other lease in existence; and this is a lease on the face of it. But still I think, on the meaning of the terms of the notice, the defendant has

agreed to admit this instrument. I do not put it on the terms of the indorsement, because that clearly forms no part of the deed. In counting the number of folios with reference to the amount of the stamp, the words on the back of the deed would not be included. But the defendant had an opportunity of inspecting this document before admitting it, and might then have refused to admit as a counterpart that which appeared to be a lease. Whether he availed himself of that opportunity or not, it is immaterial to inquire; for what is the use of an admission, if a party is afterwards to come and say,—I did not know what I was about to admit, because I did not take the trouble to inquire. It is quite expedient to hold that, if a party make an admission without seeing the document, he should be bound by his admission.

I think we should be tying parties down too strictly to the terms of the notice, if we were to hold that this document was inadmissible, because it was described as a counterpart, when in fact it was a duplicate.

COLERIDGE J.—I am of the same opinion. I think that what was done at the trial was perfectly right. It has never been the practice, and it would be most inconvenient to call witnesses to prove that the document produced at the trial has been seen by the party admitting it. We ought not to be influenced by the particular circumstances of the case. But I ground my opinion on the general principle, that an admission by a party who has had an opportunity of ascertaining what it is he is admitting, must be taken as if he had made full inquiry. If the defendant had in this case inspected the document, he might have said,—I admit the execution of this instrument, but I object to admit it as a counterpart, because there is no original lease, or because I have the original lease, and it varies from the supposed counterpart. He would then have put the other party on his guard, and enabled him to bring the proper evidence forward at the trial; but if he makes the admission, he

1838.

DOE
v.
SMITH.

1838.

DOE
v.

SMITH.

lulls his opponent into security; and therefore, I think, precludes himself from taking the objection at a future time. The case put as to the admission of the copy of a probate, which afterwards turned out to be a mere unauthorized copy on plain paper, made in an attorney's office, bears no similitude to the present case; for the admission in that case would be of the copy of a probate made in the regular way, and the copy put in would be of a different nature altogether. Here the instrument, if originally a counterpart, would remain a counterpart, though the lessor had added her seal. Here, also, the defendant admits the execution of an instrument of the particular description mentioned in the notice.

Lord DENMAN C.J.—I never entertained any doubt in this case. It is true that admissions of this nature may, as has been suggested, be made the means of defrauding the revenue; but there is always good security that that will be protected by the vigilance of the contending parties.

Rule discharged.

Friday,
April 27th.

The QUEEN v. BALDWIN.

1. An affidavit that the defendant did print and insert a libel in a certain newspaper called *The Standard*, a copy of which is annexed, is not sufficient proof of publication, so as to furnish ground for a criminal information.

SIR J. CAMPBELL A. G. had obtained a rule nisi against the defendant for a criminal information, for a libel in the *Standard* newspaper. The affidavit upon which the rule was obtained stated, that "the defendant did print and insert in a certain newspaper called *The Standard*, a certain libel relating to this deponent, a copy of which newspaper is annexed to this affidavit." Affidavits were filed in answer, admitting the publication.

2. Where an affidavit, upon which a rule nisi for a criminal information has been obtained for a libel, omits to shew publication, the prosecutor cannot afterwards, when cause is shewn against the rule, avail himself of affidavits on the other side, in which the publication is admitted.

Sir *W. W. Follett* now shewed cause against the rule, and objected that the affidavit upon which the rule had been obtained, did not swear distinctly to the fact of publication.

1838.

 The QUEEN
 v.
 BALDWIN.

Sir *J. Campbell A. G.*, contra. The affidavits which have been used in shewing cause, admit the publication.

LORD DENMAN C. J.—You cannot resort to them; and if the Court had been aware of any fatal defect in your affidavits, they would not have granted the rule.

Sir *J. Campbell A. G.* A copy of the Standard newspaper is stated to be annexed to the affidavit. This is sufficient *prima facie* evidence of publication, although deponent does not say where he bought the copy.

LORD DENMAN C. J.—I do not think that is even *prima facie* evidence; and if it were, we ought not to be satisfied with it, when it is so easy to have the positive fact of publication ascertained.

LITLEDALE J. concurred.

PATTESON J.—If a prosecutor does not choose to follow the plain directions of the statute (38 *Geo. 3*, c. 78,) which are for the express purpose of facilitating proof of publication, he must give some other proof of a clear and positive nature.

COLERIDGE J. concurred.

Rule discharged (a).

(a) See *Watts v. Fraser*, 2 N. & P. 157.



1838.

*Monday,
May 7th.*

By a judge's order, which was afterwards made a rule of Court, all matters in difference in an action of ejectment, brought on two several demises, were referred to an arbitrator, the costs of the suit and reference to abide the event of the award, and the successful party to sign judgment, as if the action had been tried at Nisi Prius, and to proceed in the usual way for the costs on such judgment. In August, 1837, the arbitrator awarded that the plaintiff was "intitled to a certain part of the lands sought to be recovered in the said action," namely, to a certain strip of land, which he set out by metes and bounds. No attempt was made to set aside the award itself, but judgment having been entered up, a rule was obtained by the defendants in Hil. T. 1838, to set aside the judgment, and to restrain execution: Held,

DOE d. MADKINS and another v. HORNER and another.

EJECTMENT on the several demises of *Madkins* and one *Long*, for lands in Kent. Particulars of demand had been given. On the 8th of March, 1836, Mr. Justice *Patteson*, at chambers, with consent of the parties, made an order, by which "all matters in difference in the cause" were referred to the arbitration of a barrister. The costs of the suit, and of the reference and award, to abide the event of the award, and no writ of error to be brought. If the award should be in favour of the plaintiff, the plaintiff was to be at liberty to sign judgment against the defendant in the same manner as if the cause had been tried at Nisi Prius, and to issue a writ or writs of possession thereon, to obtain possession of the lands sought to be recovered, and also to proceed in the usual way for the costs on such judgment; and if the award should be in favour of the defendants, then the defendants were to be at liberty to sign judgment as if the cause had been tried at Nisi Prius as aforesaid. The order to be made a rule of Court.

The said order was made a rule of Court, and the arbitrator duly published his award in August, 1837, the material part of which, after recital of the order of reference, was in the following terms:—"I do award and adjudge that the said plaintiff was on the 1st day of March, in the year 1834, and still is, entitled to the possession of a certain part of the lands sought to be recovered in the said action (that is to say), of a strip of land, partly covered with water,

1. That the defendants must be confined to objections appearing on the face of the award, as if they were shewing cause against a rule for an attachment.

2. Per *Littledale* and *Patteson* Js., that the award was bad on the face of it, for want of finality, because it professed to deal with part only of the premises in question, and it did not appear that the residue had been taken into consideration.

3. Per *Patteson* and *Coleridge* Js., that it was likewise bad for not stating on which of the two demises plaintiff had succeeded.

4. *Quere*, whether it was not incumbent upon the arbitrator to award to the plaintiff nominal damages.

situate in the parish of Woolwich, in the county of Kent, and intended to be represented by the yellow colour in the plan or map, at the foot of this my award (and which I hereby declare shall be taken as part of my said award), which said strip of land is bounded, &c. &c." The award concluded by giving a minute description of the strip of land in question.

1838.



DOE
d.

MADKINS
and another
v.

HORNER
and another.

Ogle, in Hilary term last, obtained a rule to shew cause why the judgment which had been entered up should not be set aside, and why the lessors of the plaintiff should not be restrained from issuing execution, upon (amongst others) the following grounds:—That the arbitrator had not finally decided the matters in difference referred to him: that he had not awarded any damages to the lessors of the plaintiff, and that the award was not in favour of the said lessors of the plaintiff so as to entitle them to enter up judgment, pursuant to the terms of the order of reference.

Cresswell and *Armstrong* now shewed cause. The arbitrator has finally disposed of all the matters in difference referred to him, for, by awarding that the plaintiff is entitled to "a certain part of the lands sought to be recovered," he awards, by necessary implication, that the defendants are entitled to the residue, or at all events, that the plaintiff is entitled to no more. If the action had been in assumpsit for 20*l.*, an award of 10*l.* to the plaintiff would be conclusive against the claim for any thing more. An award in ejectment differs from a judgment after verdict, for an award precludes future actions for the same land. *Doe d. The Drapers' Company v. Wilson* (a) shews, that the plaintiff succeeding in ejectment, has a right to judgment generally, without limitation by metes and bounds, and that it is for him to take care that the writ of possession does not issue for too much.

First point:
An award in
ejectment that
the plaintiff is
entitled to
"part of the
lands," is suffi-
ciently final.

The next objection is, that the arbitrator has not awarded to the plaintiff any damages. But he was not bound to do so, for the land was the substantial object of the action,

Second point:
Where an
ejectment is
referred, and
by the order
of reference

(a) 2 Stark. 477.

1838.


Doe
d.MADKINS
and another
v.HORNER
and another.

judgment is to
be signed and
costs taxed, as
if the cause
had been tried
at Nisi Prius,
the arbitrator
need not find
any damages,
if he awards
for the plain-
tiff.

and not damages. Indeed, he had no power to award them, for although judgment may be signed as if the cause had been tried at Nisi Prius, yet, not having the power reserved to him, he could not enter a verdict; *Hutchinson v. Blackwell* (a); and therefore could not award damages.

[*Littledale J.* Can you have judgment entered up for the costs unless there are nominal damages to tax the costs upon?] The plaintiff's title to costs does not depend upon the Statute of Gloster, but upon the order of reference.

[*Littledale J.* No doubt the plaintiff is entitled to costs; my only doubt is, whether he can have judgment entered for the costs, as no damages have been awarded.] Perhaps, as the judgment is to be assimilated to judgment after verdict at Nisi Prius, the reference itself may give the plaintiff a right to damages; but at all events the want of damages cannot be alleged as error in the record, for by the order of reference no error is to be brought. In *Wykes v. Shipton* (b) the arbitrator disposed of several issues in the cause referred to him; but his award was set aside because he had neglected to assess damages on a judgment by default, which the defendant had suffered to a new assignment. There, however, the arbitrator had clearly the power to assess the damages in question, for a verdict and damages had been taken for the plaintiff, subject to the reference. *Anonymous* (c) shews that, where costs are to abide the event of an award, the party, in whose favour the event is substantially decided, is entitled to costs, although no express directions are given. There can, therefore, be no difficulty on the taxation of costs in this case; the plaintiff will be entitled to costs in respect of the strip of land recovered by him; and the defendants to costs in respect of the residue.

First point.

Sir *W. W. Follett* and *Ogle* contra. According to the argument on the other side, the arbitrator might have con-

(a) 8 Bing. 331.

(c) 1 Smith, 426.

(b) 3 N. & M. 210.

fined his award to a single perch of land, although there were a thousand acres in dispute. The matter in difference was the right of the plaintiff on the one hand, and of the defendant on the other. On the face of the award the arbitrator professes to determine upon the right to a "certain part of the land" only, and as to the residue of the land, it does not appear that he ever took it into his consideration at all, although by the particulars of demand it appeared to be an essential matter in difference. Where the cause is referred, and particulars are given, the award must adjudicate upon them all, even though some of them are abandoned before the arbitrator; *Samuel v. Cooper* (a). [Patteson J. Suppose in assumpsit for several claims an award made that the defendant owed a particular sum?] That might be sufficient, for the particular sum might be owing in respect of all the several claims; otherwise, it would not be sufficient, even if some of the claims were admitted to be free from all question; *In the matter of the arbitration between Robson v. Railston* (b). A verdict may be unobjectionable which disposes only of some of the claims sought to be enforced, but an award must carry out the objects of the reference, by settling every thing between the parties. If the award had decided upon all the closes, no future action could be brought; *Doe d. Morris v. Rosser* (c), but a fresh ejectment in this case may be commenced to-morrow. [Cresswell here mentioned *Dunn v. Murray* (d) to shew that no fresh ejectment could be brought.]

Another objection to this award is, that the arbitrator has not said on which demise the plaintiff has recovered: this may make a material difference to the parties on the taxation of costs.

The award again is bad, because no damages are given. One point referred was as to the ouster by defendants, and the damages in respect thereof. The costs are to follow the event, that is, the legal event; and where there are no

1838.

Doe
d.MADKINS
and another
v.
HORNER
and another.

Third point:
When an
ejectment with
two demises
is referred,
costs to abide
the event; if
the arbitrator
finds for the
plaintiff, he
must specify
on which
demise.

Second point.

(a) 2 Ad. & El. 752; S. C. 4 N. & M. 520.

(b) 1 B. & Ad. 723.

(c) 3 East, 15.

(d) 9 B. & C. 780; 4 Mann. & R. 571.

1838.

Doz

d.

MADKINS
and another
v.HORNER
and another.

damages there can be no costs. *Wykes v. Shipton* (a) is so far very like the present case. The event indeed in this case is altogether equivocal, so that it is difficult to say which party is entitled to costs; *In the arbitration of Leeming and Fearnley* (b).

The arbitrator has not said that the plaintiff is entitled to the term, but merely to possession.

Fourth point:
Objections not
on the face of
an award, may
be taken at
any time, on
an application
to set aside
the judgment
entered up on
it.

But there are other objections to the award, not appearing on the face of it, and which it appears from the authority of *Wrightson v. Bywater* (c), may be taken advantage of, on an application of this kind, which is not to set aside the award itself, but the judgment upon it.

[The Court intimated that they must confine themselves to objections on the face of the award.]

Fifth point:
Objections on
the face of an
award may be
taken at any
time, on an
application to
set aside the
judgment.

LITLEDALE J. (d)—A question might perhaps have been suggested, whether, at this distance of time, we can entertain this rule at all; because, although the object of it is not to set aside the award, yet the effect will be the same. I think, however, that the defendants may by this rule take any objections apparent on the face of the award, just as if they were shewing cause against a rule for an attachment, on account of their disobedience to the award. It may be said that in this case they originate the objections, and are not defending themselves against an enforcement of the award; but the distinction is one of form merely, and ought not to preclude them.

First point.

Is the award then bad on the face of it? By the order of reference, all matters in difference in the cause were submitted to arbitration. The declaration in the cause was general, containing no description of the premises in question, but the arbitrator does not even profess to decide upon all matters in difference, for he says that the plaintiff "is entitled to a certain part of the lands sought to be recovered." It has been contended that by these expres-

(a) 3 N. & M. 240.

(b) 5 B. & Ad. 403.

(c) 3 M. & W. 199.

(d) Lord Denman C. J. was at the Privy Council.

sions he virtually determines that the residue of the lands belonged to the defendants, or at all events that it did not belong to the plaintiffs. This might be his meaning, but it is not expressed, nor is it to be gathered by necessary implication from what is expressed. Suppose a reference of an action of *assumpsit*, brought to recover 50*l.*, as the price of a horse, and 50*l.* as the price of a bale of cloth; an award that the plaintiff was entitled to 50*l.* for the horse, would certainly leave the other claim for cloth quite open. So in this case, the dispute as to the residue of the lands in question is left unsettled; and though a verdict in ejectment determines nothing conclusively, so as to prevent future actions in respect of the same property, yet an award ought to be quite final. I do not say whether it should set out the property by metes and bounds, but it should do something with respect to every part of the property.

I have some doubt as to the validity of another objection, viz. that the award does not particularize the demise on which the plaintiff has recovered. Whether he is entitled on the one demise or the other, may make a difference in the taxation of costs. Where at *Nisi Prius* a verdict has been taken generally in ejectment on several demises, any mistake with respect to costs may be set right by the judge's notes.

PATTESON J.—I think the defendants must be confined to objections appearing on the face of the award, just as if they were defending themselves against an action upon it or an attachment; and I cannot see that *Wrightson v. Bywater* (a) decides any thing to the contrary. Now on the face of it this award cannot be held good, unless by importing into it something which is not expressed. The arbitrator has said that the plaintiff is entitled to possession of a certain part of the lands in question, are we therefore to infer that he says also that defendants are entitled to the residue, and to their costs in respect of it? We have a declaration with general words, and whether the particulars

1836.

DOE
d.MADKINS
and another
v.HORNER
and another.

Third point.

Fourth point.

First point.

(a) 3 M. & W. 199.

1838.

Dor
d.MADKINS
and another
v.
HORNER
and another.

of demand gave an accurate description of the premises or not is immaterial, for we cannot look to them. If the arbitrator, after awarding a certain part to the plaintiff, had added the words "and no more," it would have been more explicit, but I do not think even that would have done. If by implication the defendants have all the residue of the lands awarded to them, they would have a right to costs for defending their claim to so much, and also to set up the award as a conclusive answer to any subsequent action by the same plaintiffs in respect of it. But, except by extraneous evidence, we cannot know that the arbitrator has ever taken the residue into his consideration, and if defendants have a title, they had a right to have it found under the hand of the arbitrator, and to have something more than mere inference and implication to set up against any subsequent action.

Third point.

I think the award is bad also for not saying on which demise the plaintiff is entitled. The costs are to abide the event, and the event is not ascertained in such a way that the costs can be properly taxed. The same field may certainly have been recovered by the plaintiff, partly on one demise and partly on the other, but if so, it should have been so expressed. Without wishing at all to depart from the general practice, that the Courts will not be astute to set aside awards, I must say that in my opinion this award cannot be enforced.

Fourth point.

COLERIDGE J.—The defendants must be confined to objections on the face of the award, just as if they were shewing cause against a rule for an attachment. The plaintiff has got judgment; that judgment stands upon the award, and that award has been allowed to stand unquestioned up to this time. Ought the defendants then to be in a better situation than if they were shewing cause against an attachment? In *Wrightson v. Bywater* (a) this point never arose, and after all the award there was held good.

First point.

I must however say, considering the desire of the Courts

(a) 3 M. & W. 199.

to sustain awards, that I have doubts whether the arbitrator, by awarding to plaintiff a certain part of the subject in dispute, has not also by necessary implication awarded that he is entitled to no more; and if he had said in terms that the plaintiff was entitled to no more, I think enough would have been done. It is material in this case, I admit, that the arbitrator professes only to deal with part of the matters in difference, and if I were compelled to come to a conclusion on this point, I might agree with the rest of the Court. But I must say I have no difficulty on the other point. The arbitrator, by not stating on which demise the plaintiff has recovered, has, in substance, omitted to state which of two plaintiffs has recovered.

With regard to the non-assessment of damages, it is unnecessary to express any opinion, but, it appears to me, the plaintiff, by the order of reference, was empowered to proceed exactly as if he had obtained a verdict at nisi prius, which would, I think, have entitled him to sign judgment for nominal damages, although the arbitrator himself had perhaps no jurisdiction to award them.

Rule absolute.

1838.

DOE

d.

MADKINS
and another
v.

HORNER
and another.

Second point.


The QUEEN v. The Mayor and Town Clerk of EVESHAM.

TALFOURD Serjt. in Easter term last, had obtained a rule calling upon the Mayor and Town Clerk of the borough of Evesham, to shew cause why a writ of mandamus should not issue directed to them, commanding them to enter in the minute-book of the council of that borough, the resolution passed at a meeting of the council, held on the 3d December, 1836.

From the affidavit on which the rule was obtained, it appeared that some of the members of the town-council of Evesham, in November 1836, had called upon Dr. Cooper, the then mayor, to convene a special meeting of the borough for the purpose of taking into consideration a charity,

Tuesday,
May 9th.

The minutes of a meeting of town-council ought to be drawn up and signed by the chairman at the time of the meeting, under s. 69 of 5 & 6 W. 4, c. 76.

1838.

 The QUEEN
 v.
 Mayor &c. of
 EVESHAM.

called *Deacle's* charity. The mayor having refused to call the meeting, five of the town-council convened a meeting for the 3d December, 1836; and at the meeting assembled in consequence, at which the five members of the council who signed the requisition, and the town-clerk attended, one of the members of the council present, who was an alderman of the borough, was placed in the chair, and divers resolutions were passed respecting the charity. The affidavit then stated, that the town-clerk, at such meeting, caused a draft to be made in writing of such resolutions, which the chairman took home to revise before entering it, and the chairman having so revised such draft, he caused a fair copy thereof, signed by himself, to be delivered to the town-clerk on the day after the meeting. The affidavit then stated, that the town-clerk had neglected to enter the minutes in consequence of a protest from the mayor that the meeting of 3d December was irregular; and that at a quarterly meeting of the town council, held on the 8th February, 1837, a resolution was passed, and a minute entered, ordering the town-clerk not to enter any minute of the meeting of council held on the 3d December, on the ground of its being an invalid and irregular meeting. An affidavit of *Dr. Cooper* and others, setting out the circumstances of the case, was filed in answer.

Sir *W. W. Follett* and *C. Cooper* on a former day (May 8th) shewed cause. I. This mandamus is improperly directed. The mayor and town-clerk have no more power over the minutes than any other member of the council. II. The application is wrongly conceived; for it is clear from s. 60 of 5 & 6 W. 4, c. 76, that the minutes of the proceedings of a meeting should be made at the time, and be signed by the chairman; the words are, "minutes of the proceedings of all such meetings shall be drawn up and fairly entered into a book to be kept for that purpose, and shall be signed by the mayor, alderman, or councillor presiding at such meeting."

Talfourd Serjt. *contra*. The practice, and the only convenient practice, in all these cases is, for the town-clerk to take rough minutes at the time, which may be afterwards entered in a book kept for the purpose. The intention of the legislature was to legalise this practice, for otherwise the minutes could not be fairly entered, during the interruptions to which the meeting may be subjected.

LORD DENMAN C. J.—The parties who make this application are themselves in fault. Section 69 directs the chairman of the meeting to sign the minutes; and if a question be raised as to the correct method of taking the minutes of a meeting, we must hold, on the words of the act, that they ought to be taken at the time when the meeting is held.

LITTLEDALE J. concurred.

PATTESON J.—On the words of the act, I think it clear that the minutes should be drawn up at the time, and signed at the time. This may be occasionally an inconvenient practice, and it might be better that the town-clerk should draw up rough minutes, and that the chairman should sign when they are entered subsequently in the book kept for the purpose. Such a practice would probably not be void, as the irregularity might be cured by the subsequent signature; but if we are called upon to issue a mandamus, we must be sure that there is a strict legal ground for the application.

COLERIDGE J.—We are called upon to issue a mandamus to the mayor and town-clerk to enter the minutes of a meeting of town council. But if it is the duty of the town-clerk to enter the minutes, it must be his duty to do so at the time of the meeting, and not afterwards. It is important that the minutes should be entered at the time, for if only rough minutes are taken, which are entered at a subsequent time, there can be no certainty that an accurate record of what actually took place is preserved.

Rule discharged.

1858.
The QUEEN
v.
Mayor &c. of
EYRESHAM.

1838.

Thursday,
May 10th.

THE QUEEN v. The Wardens and Overseers of the Poor and Inhabitants of the Parish of St. SAVIOUR'S, SOUTH-WARK.

1. The Court, in the exercise of their discretion on the Mandamus Act (1 Will. 4, c. 21), will grant costs to the prosecutors, although there may have been doubtful questions of law raised on the return.

2. Where a return to a mandamus, shewing cause for disobedience to the writ, is made by the inhabitants of a parish, if the return is quashed, the Court, in granting costs, will ascertain which of the inhabitants joined in making the return, and make the rule for costs absolute against them.

SIR F. POLLOCK, on a former day in this term, obtained a rule calling upon the defendants to shew cause why they should not pay to the prosecutors their costs for their applications for the two writs of mandamus in this case(a), and also the costs of the writs and of this application, under the 1 Will. 4, c. 21.

Sir J. Campbell A. G., and **E. Perry**, now shewed cause for the inhabitants. In doubtful cases like the present, when the decision of a Court of Law is required as a guide, the practice of this Court has been never to grant costs: *Rex v. The Commissioners of the Harbour of Rye* (b), *Rex v. The Lord of the Manor of Oundle* (c), *Lord Boston v. The Thames and Isis Navigation* (d). In *Rex v. The Lord of the Manor of Oundle* (c), **Lord Denman C. J.** said,—“The granting of costs is entirely in the discretion of the Court, and this case has been much too doubtful a one to warrant their doing so in this instance.” Besides, the inhabitants have succeeded on the main ground of their opposition to the writ; they never contested the right of the chaplains to receive their stipends; but on examining the returns and the affidavits, it will be found that they objected to make a rate for church repairs, when the wardens had other funds for the purpose; and this was conceded on the argument to be a good objection. It may be said that it is hard for the chaplains not to get their costs; but they have obtained a great benefit from the decision of the Court, as it gives them a right to have a rate made every year to defray their salaries. If the Court makes the rule absolute, how is it to

(a) See *Rex v. The Wardens of St. Saviour's*, 1 N. & P. 496; *Regina v. The Wardens, &c. of St. Saviour's*, 3 N. & P. 126.

(b) 5 B. & Ad. 1094, n.

(c) 1 A. & E. 290, n. 299; 3 N. & M. 484.

(d) 5 A. & E. 817.

be enforced? Is every inhabitant to be made liable *in solido*, whether he opposed the writ or not? or are all the costs to be obtained from any one individual whom the prosecutors may single out?

Sir *F. Pollock*, *contra*. The question is, not whether any one shall be punished for raising a question of law, but whether parties who succeed in establishing a right are to defray the expenses of litigation raised by others. Justice will not be done if the chaplains do not get their costs. It was not their fault that other questions of church rates may have been mixed up with the arguments. They have come to the Court to enforce certain statutes, and they have succeeded. The costs in this case will not be felt to the extent of a farthing each by the inhabitants, but they would be ruinous were they to fall on the chaplains. Besides, the wardens have ample funds of the parish, out of which all the costs may be paid. [*Patteson J.* My difficulty is to discover who the inhabitants are against whom the rule is to be enforced.] No greater difficulty can arise in this case than in any other where inhabitants are parties. There might be a difficulty in selecting any one individual, but the parties who opposed the writ are undoubtedly liable.

Lord DENMAN C. J.—We have felt great difficulty in this case in satisfying ourselves against whom the rule should be made absolute; but on consideration we think no difficulty will be found in moulding the rule so as to meet the case. It is quite clear, although many points were raised on the different arguments, that the chaplains are entitled to their stipends out of the rate, and they ought not to be made to pay for maintaining their rights. I cannot conceive a greater act of oppression than to suffer a large body to obstruct individuals in the assertion of their rights, without any risk to themselves. The recent act (a) gives us a discretionary power over costs; and in the exer-

1838.

The QUEEN
v.
The Wardens
&c. of
ST. SAVIOUR'S,
SOUTHWARK.

(a) 1 Will. 4, c. 21.

1838.

The QUEEN
v.
The Wardens
&c. of
St. SAVIOUR'S,
SOUTHWARK.

cise of that discretion, we can find out who the parties opposing the execution of the writ were. The rule therefore will be absolute against all those who made a return.

LITTLEDALE, PATTESON, and COLERIDGE, Js. concurred.

Hindmarsh, for the wardens, subsequently applied that the rule should not be absolute against the wardens in their personal character; to which the Court assented.

Rule absolute.

'The rule was drawn up in the following form:—

" Upon hearing counsel on both sides, it is ordered that the defendants do pay to the prosecutors or their attorney their costs of the applications made for the two writs of mandamus issued in this prosecution, and also the costs of the said writs and incident thereto, and the costs of this application; but that the churchwardens and overseers shall not be personally liable as such. And it is further ordered, that such costs be taxed by the coroner and attorney of this Court."



Thursday,
May 10th.

MURLEY v. M'DERMOTT.

1. Trespass for throwing down a wall. Pleas—1. that the wall was not the wall of the plaintiff; 2. that the wall was a party-wall, standing partly on land of the plaintiff, partly on land of the defendant. The contest at the trial was, as to whom the wall belonged. The jury found that it was a party-wall:—Held, that upon this finding the defendant was entitled to the verdict on the first issue, as the plaintiff on that plea was bound to prove that the whole wall was his.

2. *Semble*, that the plea of the wall being a party-wall, is no answer to a trespass to the whole wall.

3. Where the issue between purchasers of two lots at a sale, was as to parcel or no parcel, a handbill, describing the lots in question, which was circulated in the auction room at the time of the sale, is admissible in evidence, in order to apply the language in the deed of conveyance which described the premises as those now in the occupation of A. B., with all buildings &c. known or reputed to be parcel thereof.

plaintiff: 3. that the said wall was the wall, soil and freehold of the defendant: 4. that the said wall was, at the said time when &c., a party-wall standing, being erected and built partly on land of the plaintiff and partly on land of the defendant.

1838.

 MURLEY
 v.
 M'DERMOTT.

At the trial at the last Somersetshire assizes, before *Bosanquet* J., it appeared that the matter in dispute was as to the right to a wall dividing the premises of the parties, which abutted to the north on a workshop of the defendant's, and to the south on a building of the plaintiff's. Both parties claimed the entire wall. The act of trespass complained of was the stripping off some thatch, which served as a coping on the top of the wall. It appeared that the premises of the plaintiff and the defendant had been in one possession till the year 1837, when they were sold separately in lots, at an auction. The plaintiff's property was described in the conveyance made to him after the sale, to which the defendant was also a party, as "all that messuage and dwelling-house, with the garden, workshop and buildings behind the same, situate in a street called the Sheep Market Street, formerly called Cross Tree Street, in the town of Crewkerne aforesaid, many years aforesaid in the possession of one *John Willie*, and now in the occupation of *George Howe* as tenant thereof, together with all houses, outhouses, buildings, &c., known or reputed to be parcel thereof." The defendant's premises were described in the same conveyance in similar language, as "now in the occupation of — *Priddle*." The plaintiff proved acts of ownership exercised by the occupier of his premises with respect to the wall, and on the plaintiff's side of the wall it appeared that there had been a building supported by it for at least forty years. The defendant proved that a building on his side of the wall had rested upon it for twenty years, and in order to prove that the whole wall passed to him in the conveyance, he put in a handbill, describing by their quantity of frontage the lots purchased by the plaintiff and himself, which was circulated at the auction, and was there

1838.

MURLEY
v.

M'DERMOTT.

seen by the plaintiff's agent. This evidence was objected to, but was received by the learned judge. The jury found on the first and third issues for the plaintiff, and on the fourth for the defendant; whereupon the learned judge ordered the verdict on the second issue to be entered for the defendant also.

Erle, on a former day (*a*) in this term, moved for a rule nisi to enter a verdict for the plaintiff on the second issue, and for judgment non obstante veredicto on the fourth issue. He also moved for a new trial on the evidence.

On the fourth issue the plaintiff is entitled to judgment non obstante veredicto. The plaintiff complains of a trespass to the whole wall: the defendant professes to answer the whole count, but in effect justifies the alleged trespass as to half the wall only. [*Patteson J.* Though the plea may be demurrable, that does not entitle you to have judgment non obstante veredicto.] It is no answer to the plaintiff's complaint. On the second issue the plaintiff is entitled to the verdict; for the finding of the jury that the wall is a party-wall, standing partly on the plaintiff's land, establishes that half the wall is the wall of the plaintiff, and the other half the wall of the defendant. The plaintiff's and defendant's property divide ad medium filum muri; the wall therefore must be considered as two walls; and a trespass having been proved to the whole, the plaintiff is entitled to the verdict. In *Cubitt v. Porter* (*b*) it was held, that where two persons are tenants in common of a party-wall, a justification of trespass to the whole wall, by one of the tenants, in an action by the other, is good; but it appears, from *Matts v. Hawkins* (*c*), that it does not follow, because two persons have a party-wall, that they are therefore tenants in common, and that if the wall is built half on the land of each, so much of the wall is the exclusive property

(*a*) April 24th, before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

(*b*) 2 Mann. & Ry. 267; *S. C.* 8 B. & C. 257.

(*c*) 5 Taunt. 20.

of each party. The facts of the present case bring it within *Mutts v. Hawkins*(a): for the finding of the jury establishes that the half of the wall abutting on the defendant's property is the back of his workshop, and the other half is the plaintiff's wall.

With regard to the admission of evidence, the criterion at the trial was, what had been in the occupation of *Howe*, and what in *Priddle's*. The defendant put in evidence a handbill, containing a description of the land to be sold by auction, and which described the property he bought as having so many feet of frontage. The criterion of frontage referred to in the handbill, was quite different from that in the deed as to the reputed occupation of the tenants. The effect of the handbill therefore was to vary the description in the deed, which makes it inadmissible.

Cur. adv. vult.

Lord DENMAN C.J. on this day delivered the judgment of the Court. After stating the pleadings, his lordship continued thus:—The foundation of the motion as to the second issue is, that regard being had to the finding on the fourth, it must be taken that there are two walls,—one on the plaintiff's land, and his property—the other on the defendant's, and his property; and as a trespass has been proved on that wall, or that portion of the two united walls which stands on plaintiff's land, and is his property, the second plea is negatived, and the issue should be found for him; and it is said the abutments in the declaration present no difficulty in the way of this finding, for that the portion of wall on the north of the plaintiff's wall is only the back wall of the defendant's workshop and building. But we are of opinion that this reasoning cannot prevail: it is clear that the plaintiff brought his action for an alleged trespass on the *whole* of that which the jury have found to be a party-wall, as one entire building, erected on his own land; and the struggle in the cause was, as to the property in the

1838.

 MURLEY
 v.
 M'DERMOTT.

(a) 5 Taunt. 20.

1838.

MURLEY
v.
M'DERMOTT.

whole wall; and *assuming* that, from the jury's finding, we must take it there are two walls, one on the land of each party, that same finding shews that these two walls abut on each other; and the plaintiff consequently has failed to prove his property in the wall described by its abutments in the declaration. The fact that the defendant's workshop and other buildings of the defendant, mentioned in the declaration, are built against, with their roof resting on, the top of the united walls, does not make that wall, which stands on the defendant's land, a portion of themselves; *they* are not therefore the abutments, but the wall itself is the abutment to the plaintiff's wall. If the verdict is rightly entered on the second issue, it is unnecessary to grant any rule for the purpose of considering whether the fourth be a good plea. Nothing would depend on that plea but the costs of the issue, which must be inconsiderable, as all the evidence applicable to it is also material to the second. Upon the defendant's allowing the plaintiff the costs of this issue, there will therefore be no rule on this point.

Motion was also made for a new trial, on the ground that the verdict was against the evidence, and that some evidence had been improperly received. We have seen the learned judge's note: there appears to have been much evidence offered on both sides; and he is satisfied with the verdict.

The evidence said to have been improperly received was a handbill, advertising the properties both of plaintiff and defendant for sale; and it was urged that this was received in order to construe the deed by which the plaintiff's property was conveyed to him. The plaintiff and defendant had purchased of the same owner; the lot which each purchased was described in his deed by a reference to the occupation of the then tenant, and there were words to pass all that "was known or reputed to be parcel" of such occupation. There was evidence to shew that the handbill in question was circulated in the sale room before and at the time of the sale, and that it was seen by the person who attended as the plaintiff's agent, and bid and bought for

him. Looking then at these facts and the language of the deed, we think this handbill properly received not to control the language of the deed, or to construe it, but to apply it. It was evidence to shew what it was that at the time of the sale was known or reputed to be parcel of that tenant's occupation, which the plaintiff purchased, and which was conveyed to him by the deed. For these reasons we think there should be no rule on any of the grounds taken by Mr. *Erle*.

Rule refused.

WRIGHT v. GODDARD and others.

1838.
MURLEY
v.
M'DERMOTT.

COVENANT, on an indenture of lease. The declaration stated a demise from the plaintiff to defendants, for seven years, commencing from the 11th October, 1834, and set out the following covenants: 1. A general covenant by the defendants to repair the premises during the term, reasonable use and wear thereof only excepted; 2. A covenant to yield up, upon the expiration or other sooner determination of the term, all the demised premises in good and substantial repair, reasonable use and wear thereof only excepted; 3. Covenant for liberty to the plaintiff to enter and view the state of the premises, and in case of defects and want of repair as aforesaid, that the defendants, within one calendar month next after notice thereof in writing should have been given to them, should cause this repair to be done. The declaration then stated, that by the said indenture it was provided between the parties, that if the defendants should be desirous of putting an end to the demise at the expiration of the first three years of the term of seven years thereby granted, and should for that purpose deliver to the plaintiff

*Thursday,
May 10th.*

1. Payment into Court generally to a declaration in covenant, setting out several covenants and assigning a general breach, admits some damage upon every part of the breach, and therefore judgment cannot be arrested, although the breach, with reference to some particular covenant, would be bad on demurrer.

2. Thus, where a covenant to repair, and to leave in repair,

made an exception of reasonable wear and tear, and the breach contained no such exception; and another covenant was to repair after a month's notice in writing, but the declaration did not state that such notice was given *in writing*: Held, that these defects were waived by payment generally, on a breach, stating that defendant did not, within a month after notice, or at any other time, repair or leave in repair.

3. Where there is a general covenant to repair, and leave in repair, and another covenant to repair on a month's notice, if the declaration assign a breach on each of these covenants, it is open to a special demurrer if the damages from each are not separately stated.

1838.

WRIGHT
v.
GODDARD
and others.

their six months' previous notice in writing, that then, at the expiration of the said three years, the said lease and every thing therein contained, should cease and be absolutely void to all intents and purposes.

The declaration then averred entry by the defendants, and a continuance in possession until the 11th October, 1837, when the said demise was ended and determined, according to the effect of the indenture, they the said defendants having given to the plaintiff six calendar months' notice to determine the tenancy at the end of the first three years. Averment of performance by the plaintiff of his covenants, and that he did, during the demise, to wit, on &c., give to the defendants notice of the want of repair. Breach, that defendants did not nor would, within one calendar month next after such notice, or at any other time, well and sufficiently repair the said premises &c. in a good and substantial state of repair, nor did nor would leave the premises aforesaid in good, substantial, and tenantable repair, at the determination of the said term aforesaid, but on the contrary thereof, &c. &c. Plea: payment of 12*l.* into Court, and averment that the plaintiff had not sustained damages to a greater amount than the said sum &c., in respect of the causes of action in the declaration mentioned, or any of them. Replication, *damnificatus ultra*.

At the trial, at the last Norfolk assizes, before *Purke B.*, the plaintiff recovered a verdict with 23*l.* damages.

Byles, on a former day in this term (*a*), moved for a rule nisi to arrest judgment. There are several objections to the declaration in this case. The covenant in the lease to repair after a month's notice, expresses that the notice is to be in writing, but the declaration contains no averment that notice in writing was given, and as there was no issue upon this fact, the defect is not cured by verdict. [*Patteson J.* In *Everard v. Paterson* (*b*), where there was a submission to

(*a*) Tuesday, May 24th, before Lord Denman C. J., *Littledale*,
Patteson and *Coleridge Js.* (*b*) 6 Taunt. 645.

arbitration, "so that the award be in writing under the hand of the arbitrator," it was held to be error, if the declaration did not shew that the award was under the arbitrator's hand.] No answer can be made to this objection, except that the defendant has paid money into Court on the breaches assigned. But the declaration contains three covenants: 1st. To repair generally; 2d. To yield up in repair at the determination of the term; 3d. To repair after a month's notice in writing; and a breach is assigned, which may be applied to any one of these covenants. All that the defendant admits by paying money into Court is, that so much damage has accrued on the breaches properly assigned. He admits the contract as stated in the declaration, and that damage has accrued on the legal causes of action stated, but no more (a). [*Coleridge J.* In *Randall v. Lynch* (b), it was held, that if payment be made upon any one of the breaches in an action of covenant, it is unnecessary to prove the deed.] That is on the principle of the contract being admitted.

Another objection is, that the power to determine the lease at the end of three years, was to be by a notice in writing, and it is not averred that this notice was in writing. Another is, supposing the Court to say that the lease was well determined by the notice, the provision in the lease in that case is, that then the said lease, and every thing therein contained, shall cease and be absolutely void. But the covenant to repair generally, at the determination of the term, was contained in the lease; that covenant therefore cannot be enforced at the determination of the lease, before the end of the term.

Cur. adv. vult.

Lord DENMAN C. J., on this day, delivered the judgment of the Court, after stating the pleadings, as follows:—One of the objections to the declaration is, that the covenant as to leaving the premises in repair does not apply where

(a) See *Everth v. Bell*, 1 B. 128; and *Seaton v. Benedict*, 5 Moore, 158; *Yate v. Willan*, 2 East, Bing. 28.

(b) 2 Camp. 357.

1838.

WRIGHT
v.
GODDARD
and others.

1838.

WRIGHT
v.
GODDARD
and others.

the lease is put an end to before the end of the seven years, but by reference to the words, "or other sooner determination" of the lease, that objection falls to the ground. Another objection is, that though the special covenant to repair after notice, is brought forward as a ground to claim damages, it is mixed up with and not distinguished from the damages claimed by the general breach of covenant. We think this a good objection, and that it might have been taken advantage of on special demurrer, but not after verdict. But there are some more prominent defects in the declaration. The covenant to repair, and also the covenant to leave in repair, make an exception of reasonable use and wear. The covenant to repair after notice does not mention the exception in express terms, but it says, that in case of any defects or want of *repair as aforesaid*, the defendants are to do them, that exception therefore is embodied in the covenant; but the assignment of the breach takes no notice of this exception, and the declaration would be bad upon demurrer. But it probably would be good after verdict, according to an anonymous case in *Sir Thomas Jones*, 125. Another defect in the declaration is, that it does not state that the term was determined at the end of three years, by a notice *in writing*; and as damages are claimed for not *leaving* the premises in repair, it ought to be shewn that the term is well determined. That also would be bad on demurrer. Another defect is, that it is not stated that the notice to repair at the end of one month was *in writing*; and as damages are claimed for the breach of covenant upon that branch of the lease, that also would be bad upon demurrer. But the defendants pleaded payment of 12*l.* into Court, and that the plaintiff has not sustained damages to a greater amount than the said sum &c., in respect of the causes in the said declaration mentioned, or any of them. To which the plaintiff has replied, that he has sustained damages to a greater amount than the said sum of 12*l.*, in respect of the causes of action in the declaration mentioned. Upon the whole, we think that this general plea of payment of money into Court must be

taken to admit some damage upon every part of the breach of covenant in the declaration, and that the allegation as to the different notices, and as to the exception of reasonable use and wear, must be taken to be admitted, and that therefore there should be no rule to shew cause for arresting the judgment.

Rule refused.

GEORGE BAYLEY v. POTTS.

PLATT, on a former day in this term, had obtained a rule calling upon the plaintiff to shew cause why the writ of elegit issued out in this cause should not be set aside, with costs to be taxed, the defendant undertaking to pay 23*l.*, the amount of the damages and costs recovered, into Court; and why, upon such payment, satisfaction should not be entered upon the roll. It appeared by the affidavits that judgment was signed in the action for 23*l.*, viz. 2*l.* 10*s.* damages, and 20*l.* 10*s.* costs; and that a fi. fa. was issued indorsed to levy 24*l.* for debt and costs, including 1*l.* for the costs of the fi. fa. The sheriff had been served with an order to return the writ, but no seizure had been made; and it was sworn upon the part of the defendant, that he had no goods of which execution could be made. After the issue of the fi. fa., and before the writ had been returned, the defendant offered to pay 23*l.* for debt and costs; but the plaintiff refused to receive it unless the costs of the fi. fa. were also paid. The defendant refused, upon which the plaintiff issued a writ of elegit.

J. Bayley now shewed cause. The plaintiff was clearly entitled to the costs of the writ of fi. fa. The point has never been expressly decided, that under the 43 *Geo.* 3, c. 46, s. 5, the expenses of a fi. fa., when no execution is made, are included under the term "expenses of the execution," but the case of *Rumsey v. Tufnell* (a) leaves no

1838.
WRIGHT
v.
GODDARD
and others.

Thursday,
May 10th.

The plaintiff obtained a judgment for 23*l.* damages and costs, and issued a writ of fi. fa., indorsed to levy 24*l.*, including 1*l.* for the costs of the writ. Whilst this writ was in the hands of the sheriff unexecuted, the defendant tendered 23*l.* for the debt and costs, but the plaintiff refused to receive it, unless the defendant paid the 1*l.* for the writ:—Held, that tender was insufficient, and that the plaintiff was entitled to the costs of the writ of fi. fa. under the 43 *Geo.* 3, c. 46.

1838.

~
BAYLEY
v.
POTTS.

doubt on the matter, for the clear intention of the legislature was, to make a defendant pay the costs of the execution, when he was able to do so, and his offer in this case clearly shews that he was so. This application is a trick to deprive the plaintiff of his costs.

Platt contrà, contended that this was an attempt to charge the defendant with costs after there had been a tender to pay the debt and costs. The 43 *Geo. 3*, only gives the costs when a levy is made on goods, but there has been no execution in this case, the tender therefore was good at common law.

Lord DENMAN C. J.—When a creditor has issued a *fi. fa.* and the debtor makes him a tender of the debt and costs, minus the costs of the writ of *fi. fa.*, I think the creditor is entitled to refuse the tender, and therefore that it is justifiable in him to issue a writ of *elegit*.

LITTLEDALE J. concurred.

PATTESON J.—At common law this would have been a good tender, but, under the 43 *Geo. 3*, c. 46, the plaintiff is entitled to the expenses of the execution, which includes the costs of the writ of *fi. fa.*

COLERIDGE J. concurred.

Rule discharged.

Thursday,
May 10th.

Application
by a prisoner
taken on an
attachment
the 3d Febru-
ary, made to the Court on the 10th day of Easter term, to be discharged out of custody for irregularity, the affidavit of irregularity having been made on the 20th February, is too late.

The QUEEN *v.* BURGESS, in a cause of BURGESS *v.* BAKER.

ARCHBOLD, on a former day in this term (April 28th), had obtained a rule, calling upon the prosecutor to shew cause why the defendant *Burgess* should not be discharged

Application by a prisoner taken on an attachment the 3d February, made to the Court on the 10th day of Easter term, to be discharged out of custody for irregularity, the affidavit of irregularity having been made on the 20th February, is too late.

out of the custody of the sheriff of Suffolk, on the ground that he had been improperly taken under an attachment. It appeared by the affidavits that the defendant had been attached for non-payment of costs in the above action, pursuant to the Master's allocatur, and was in the custody of the sheriff of Suffolk. This attachment had been set aside on the last day of Hilary term (31st Jan.) last for irregularity. On the same day another writ of attachment was issued out against the defendant, and on the 3rd February last he was discharged out of custody, and was walking home, when a sheriff's officer took him under the second attachment, and lodged him in Suffolk gaol. He applied to be allowed to go home first to his place of residence, but the sheriff's officer refused. And the defendant swore that he was in his nearest course to go home, and had not made any deviation. This affidavit of the defendant was sworn on the 20th February.

1838.

 The QUEEN
 v.
 BURGESS.

Knowles now shewed cause. This application is too late. The affidavit of the defendant was made on the 20th February. The application might have been made in chambers, *Primrose v. Baddeley* (a); whereas it was not made till a late day in this term (April 28th).

Archbold contra. The rule as to time is not so strict in the case of a prisoner. There is no case which decides that a prisoner in execution on final process is ever out of time, if the execution is irregular.

The COURT (b).—The rule in favour of prisoners is stated much too favourably by Mr. *Archbold* (c). The application is clearly out of time; the objection relied on is just of that kind which ought to be taken immediately.

Rule discharged (d).

(a) 2 Dowl. P. C. 350.

(b) Lord Denman C. J., *Little-
dale, Patteson, and Coleridge, Js.*

(c) See *Spencer v. Newton*, 1
N. & P. 818.

(d) See *Foot v. Dick*, 1 Harr. &
Wol. 207; *Fowell v. Petre*, 1 N. &
P. 227; *Fife v. Bruere*, 4 Dowl.
P. C. 329; *Martimer v. Piggott*, 2
Dowl. P. C. 615.

1838.

Thursday,
May 10th.

NEWMAN v. The Earl of HARDWICKE and another.

1. A conviction for keeping open a beer-house, at times prohibited by the order of justices, under 11 Geo. 4 and 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, is bad, if it omit to aver that the justices made such an order, and to state the particular time at which the beer-house was so kept open.

2. The seven days which a party, convicted under the above acts, has for paying a penalty imposed on him, before a distress warrant can issue, are to be reckoned one day exclusively and the other inclusively, and if the warrant is not issued too soon, it is not bad because it was dated too soon.

TRESPASS, for taking a cart belonging to the plaintiff. Plea: Not guilty. At the trial before *Parke B.*, at the last Cambridge assizes, it was proved that the defendants were magistrates, acting for the division of Arrington, in the above county, and the plaintiff the keeper of a retail beer-house in the same division. A conviction of the 30th October, 1837, made by the defendants, acting in petty sessions, was put in evidence, which stated "that *Robert Newman* (the plaintiff), being a seller of beer, ale and porter, cyder and perry, by retail, and licensed to sell the same by retail, to be drunk and consumed in and upon the dwelling-house and premises thereunto belonging of him the said *Robert Newman*, hereinafter mentioned, under the provisions of the statutes in that case made and provided did, on the 7th day of October, 1837, at &c., at a time declared to be unlawful by an order of the justices of the peace for the said county, acting in and for the said division of Arrington, permit beer to be drunk and consumed in the house and premises mentioned in such licence, and situate in the said parish, in the division of Arrington aforesaid, in the said county, against the tenor of such licence granted to the said *Robert Newman*, under the provisions of the said statutes, and contrary to the form of the said statutes; whereby the said *Robert Newman* has forfeited the sum of 40s., this being adjudged to be his first offence against the provisions of the aforesaid statutes, to permit the sale of beer and cyder by retail in England, besides the costs of this conviction, &c. &c." Shortly after his conviction the plaintiff refused to pay the penalty, and a warrant, bearing date on Sunday the 5th November, was issued on the 6th, and the plaintiff's cart was taken as a distress under it. For the plaintiff it was objected, 1st. That as 11 Geo. 4 and 1 Will. 4, c. 64, s. 21, authorizes a distress warrant only in case any offender "shall refuse or neglect, within seven days after his conviction, to pay such penalty," that the warrant had been issued


too soon, seven clear days not having elapsed since the conviction, and that at all events it was dated prematurely, as the seven days could not be reckoned from the 30th October to the 5th November inclusively of both those days. 2. That the conviction was bad, because it did not appear that the plaintiff was licensed under the beer retail acts (11 *Geo. 4* & 1 *Will. 4*, c. 64, and 4 & 5 *Will. 4*, c. 85,) which alone would justify the proceeding taken against the plaintiff. 3. That there was no substantive allegation of any order having been made by the magistrates. 4. That it did not appear whether the order was made at a proper time of the year, according to 4 & 5 *Will. 4*, c. 85, s. 6; (a) or that it was the order of the year 1837, so as to be in force at the time of the conviction; or that plaintiff had had notice of it; or at what hour it required the beer-shops in the division to be closed; or at what hour the beer-shop of the plaintiff was improperly open. The learned baron over-ruled the objections to the warrant, but was of opinion that the conviction was bad for not shewing distinctly the time at which the beer-shop of the plaintiff was required to be shut, and the time at which it was improperly open, and directed a verdict for the plaintiff, reserving leave, however, to the defendants to move to enter a nonsuit.

Byles, on a former day in this term, (the 23d April,) moved for a nonsuit or new trial. It is necessary to recapitulate the various objections taken at the trial, because, if any one of them be good, the defendants cannot have their rule. It was objected to the warrant, that the seven days before its issuing should be reckoned as clear days. But in this case, as the plaintiff refused to pay the penalty imposed upon him, the warrant might have issued immediately on his refusal. The clause "refuse or neglect within

(a) 4 & 5 *W. 4*, c. 84, s. 6, enacts, August and the 14th September inclusive, the hours at which houses and premises, licensed to sell beer under this act, shall be opened and closed.

that the justices of every county, &c., in petty sessions assembled, shall fix, once a year, in every other county (but Middlesex and Surrey), on some day between the 20th

1838.
NEWMAN
v.
HARDWICKE
and another.

1838.

 NEWMAN
 v.
 HARDWICKE
 and another.

seven days," has this meaning: that if the party convicted shall "refuse" to pay, then the warrant may issue immediately, and it is only where he "neglects" to pay, without positively refusing to do so, that the seven days are given; the "seven days" are connected with the word "neglect" only, which immediately precedes them. In *Wallace v. King (a)*, the 2 *W. & M.* sess. 1, c. 5, s. 2, allowing a tenant distrained upon to replevy "within five days" after the distress, was held not to give him five clear days. From the 30th October, therefore, when the plaintiff was convicted, to the 6th November, when the warrant issued, seven days had elapsed, reckoning one day exclusively and the other inclusively. The day on which the warrant was issued is the material day, and not the date on which it was dated: *Steele v. Mart (b)*, and *Rex v. Picton (c)*.

With regard to the objections taken to the conviction, it may be observed, that the plaintiff could not have been licensed under any other acts than the acts relied upon by the defendants, for the 9 *Geo. 4*, c. 61, relates to innkeepers only. The conviction certainly does not contain any substantive allegation that an order was made by the magistrates, nor does it state the time fixed upon by their order, but the general words used are justified by the form of licence annexed to 4 & 5 *Will. 4*, c. 85; and it was not necessary to state the time for the purpose of shewing that the magistrates had not exceeded their jurisdiction, for it rests with them entirely to say at what time they will allow the beer-houses to be *open*. That the magistrates made their order at the proper time of the year, namely, between the 20th August and the 14th September, the Court will presume, on the principle that, where the negative of a fact would constitute a breach of duty, the law presumes the affirmative: *Williams v. The East India Company (d)*. It will also be presumed, that the order spoken of was an order in force, and not a stale order of any previous year; and it was not necessary that the plaintiff should have notice of it.

(a) 1 H. Bl. 13.

(c) 2 East, 195.

(b) 4 B. & C. 272; 6 D. & R. 392.

(d) 3 East, 192.

Lastly, it would have been quite sufficient to have said generally in the conviction, that the plaintiff kept his house open at unlawful hours. By the 14th section of the former of the two beer acts, the hours during which the houses may be open are specified, but not in the latter act, section 6 of which is quite general, and enacts that, "the hours so fixed from time to time by such justices, with reference to the districts and places within their respective jurisdictions, shall be deemed and taken to be the hours to be observed and complied with under this act, as fully as if the same had been specially appointed by this act." Any order of the magistrates, therefore, with respect to such hours, has the force of an act of parliament.

1838.

 NEWMAN
 v.
 HARDWICK
 and another.

Lord DENMAN C. J.—We have no doubt that the warrant issued properly, but as time is the essence of the offence of which the plaintiff was convicted, some of the objections to the conviction appear formidable, but we will consider them.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action against two justices of the peace for the county of Cambridge, for seizing plaintiff's goods under a warrant of distress. The defence was a conviction of plaintiff by the same magistrates, for having kept open his beer-shop at times prohibited by the order of justices, in execution of the power vested in them by 11 *Geo. 4* and 1 *Will. 4*, c. 64, s. 14, and 4 & 5 *Will. 4*, c. 85, s. 6. By the clause last referred to, the petty sessions are required to issue an order for closing the beer-shops during the year, which order has the force of a parliamentary enactment, and the present conviction was for keeping plaintiff's house open at a time so made illegal. Various objections were taken to it. Two appear to us to be fatal. There is no averment that the sessions made such order, nor at what time the house was kept open. These are substantial defects in the conviction, and the plaintiff is entitled to keep his verdict.

Rule refused.

1838.

Thursday,
May 10th.

MIDDLETON v. GALE and others.

An information, under 1 & 2 Will. 4, c. 32, s. 30, for trespassing in pursuit of game, may be laid by any person, although he has no interest in the land trespassed on.

CASE. The first count of the declaration alleged that the plaintiff was summoned to appear before the defendants as justices of the peace for the county of Somerset, at Taunton, on &c., to answer the complaint and information on oath of *William Sparks*, of Corpe, for having, on the 20th day of September, unlawfully committed a trespass, by entering and being in and upon certain waste land called *Pickeridge Hill*, part of the manor of Taunton Dean, the property of the lord of the said manor, in search and pursuit of game; that the plaintiff appeared, and that the defendants, as justices of the peace, did, as such justices, claim and exercise a pretended jurisdiction over the pretended offence, whereas they had not any right or power so to do, the said *W. S.* not being the occupier of the said land on which the trespass was so alleged, nor being the lord of the said manor, nor having the right of killing game on such land, nor having been proved to have been such occupier, or &c.; nor to have been authorized to institute such proceedings by such occupiers, or &c.; and it not having been proved before the said defendants, that such information was laid, instituted or prosecuted, at the instance or with the concurrence or assent of the lord of the manor: yet the defendants, well knowing the premises &c., unlawfully caused the plaintiff to be convicted for unlawfully trespassing on *Pickeridge Hill*, and to be fined for his said offence. The second count complained of another illegal conviction of the plaintiff by the defendants, on the information of the same person, for trespassing on lands called *Hayne's Farm*, in the parish of Otterford, in the occupation of *Jacob Westlake*. Plea, not guilty.

At the trial before Lord *Denman* C. J., at the last Lent assizes for Somersetshire, the informations and convictions were produced in evidence by the magistrate's clerk. From these it appeared that *Sparks* was the informer, and he was

not stated therein to be either the lord of the manor of Taunton Dean, or the owner or the occupier of the lands whereon the trespasses were committed, or to have the right of killing game in either case. The witness, however, stated that, when the informations were heard, an attorney, who attended in support of them, said that he had the authority of the lord of the manor for prosecuting the first; and, with respect to the second, that he himself rented the shooting of Hayne's Farm from *Westlake*, the occupier. The plaintiff having proved that *Sparks* had no interest in the lands trespassed on, it was contended that the 1 & 2 Will. 4, c. 32, s. 30, did not authorize the defendants to hear his complaint, and that evidence was not admissible to shew that the informations were laid at the instance of any other party; and, even if the informations could have been laid by *Sparks* with the consent of the parties authorised to complain, that there was no evidence on oath that such consent had been given. His lordship intimated that the informations under the act might be laid by a stranger, but asked the jury whether they believed them to have been laid with the consent and authority of those parties to whom, it had been contended, the right of laying them was restricted. The jury being of opinion that the informations had been so laid, under the direction of his lordship, found a verdict for the defendants.

Cockburn, on a former day in this term (the 25th April) moved for a new trial on the ground of misdirection. The new Game Act, 1 & 2 Will. 4, c. 32, s. 30, does not say by whom informations under it are to be laid, it simply enacts that the trespasser convicted before a justice of the peace shall incur a certain penalty; but it is most agreeable to the object of the act to confine the right of informing to the party injured. The imposition of the penalty is preceded by a recital that, as game is made saleable by the act, it is just and reasonable to provide some more summary means for its protection than those in existence. It appears,

1838.

MIDDLETON
v.
GALE
and others.

1838.

MIDDLETON
v.
GALE
and others.

therefore, that on account of the increased temptations to which his property was exposed, the legislature deemed it reasonable to give the owner some more convenient remedy than his action of trespass; this of course must have been prosecuted by himself, and so should the additional remedy. The public have no interest in the matter, and the act is not of a fiscal nature, so as to render it probable that any power of complaint would be given to a common informer. *Rex v. Daman (a)* and *Rex v. Corden (b)*, shew that in convictions under the 5 Geo. 3, c. 14, s. 3, for illegally killing fish, it was necessary to state in the information and to prove that the prosecution was conducted at the instance of the owner of the fishery. One reason given is, that the penalty was payable to the owner of the fishery; the same reason applies here, for by the 5 & 6 Will. 4, c. 20, s. 21, one moiety of the penalty under the prior Game Act is given to the party prosecuting for the same. This clearly was intended as compensation to the party who suffered from the trespass, and involves therefore the assumption that he alone could prosecute. Even if a conviction drawn in general terms would be sufficient, these convictions are bad, for they actually negative their own legality, by particularizing the name of *Sparks* as the informer. He has been proved to be a mere stranger, and parol evidence was not admissible to vary the terms of the convictions by proving that they were procured at the instance of any other person.

Cur. adv. vult.

Lord DENMAN C. J. now delivered judgment. The question in this case was, whether it was necessary that a complaint under 1 & 2 Will. 4, c. 32, s. 30, for a trespass committed in search of game, should be made by an owner or occupier of the land. We do not find that any decision has taken place on this point, but we have considered it,

(a) 2 B. & Ald. 378.

(b) 4 Burr. 2279.

and are of opinion that any person may make such complaint, and that the convictions, therefore, were good. There will therefore be no rule for a new trial.

1838.

MIDDLETON
v.
GALE
and others.

Rule refused.

KNIGHT v. CLEMENTS and another.

Thursday,
May 10th.

ASSUMPSIT by indorsee against the acceptors of a bill of exchange, payable two months after date. Non accerunt was the only material plea.

At the trial before *Coleridge J.*, at the Lancaster summer assizes, 1836, the plaintiff produced the bill, which had the word "two" before "months," but written *upon* the word "three," which latter word appeared to have been blotted while the ink was wet; the word "two" was written also underneath it. The stamp was sufficient for a two months' bill, but not for a bill at three months. The defendant's counsel called upon the plaintiff to shew, by distinct evidence, that the alteration apparent on the face of the bill was made before negotiation. The counsel for the plaintiff did not deny that the onus lay upon him to account for the alteration, but contended that the inspection of the bill was alone sufficient to prove the alteration to have been properly made, inasmuch as the word "three" had obviously been smeared while the ink was wet, and in the course of the drawing of the bill. The learned judge put the bill in the hands of the jury, and directed them that the onus lay on the plaintiff to prove the alteration to have been properly made, telling them, however, if they believed it to have been made under the circumstances suggested, to find a verdict for the plaintiff. He also reserved leave to the defendants to move to enter a nonsuit, if the Court should think that the plaintiff was bound to give evidence *dehors* the note, to shew that it had been properly altered. Verdict for the plaintiff.

The holder of an instrument is bound to prove that any alterations in it have been properly made. Where therefore a bill of exchange, the appearance of which left it uncertain whether it had been altered before or after issue, was submitted to a jury, with a direction that if, from its appearance, they believed the alteration to have been made before the bill was completed and while the ink was wet, they should find for the plaintiff,—the Court set aside a verdict so found, on the ground that the plaintiff should have shewn, by extraneous evidence, that the alteration was properly made.

1838.



KNIGHT

v.

CLEMENTS
and another.

Cresswell, in the Michaelmas term following, obtained a rule nisi on the above ground.

Tomlinson, on a former day in this term (a), shewed cause. It is not disputed on the part of the plaintiff, after the decisions in *Cock v. Corwell* (b) and *Sibley v. Fisher* (c), that the point made at the trial was open to the defendants, under their plea of non acceperunt. But it is submitted that there is no invariable rule which obliges a party, under all circumstances, to explain, by extraneous evidence, any alterations in an instrument produced by him. If alterations appear on the face of them to have been made in due time, so that the instrument in question never could have been complete in any other than the altered form, the jury must decide on their own inspection; and the plaintiff should not be nonsuited. If in this case the word "three" had been struck out, and the word "two" had been written after it, in the same line, and not closely foisted in between the "three" and the succeeding word "months," it would be clear that the bill never could have been completed as a three months' bill. [Lord Denman C. J. But in this case the alteration might have been made immediately after the instrument was negotiated, and before the ink was quite dry.] That is certainly possible, but the probability is that the parties found the stamp was not sufficient for a three months' bill, and then immediately blotted the "three," and wrote "two" over it, and wrote "two" underneath also, to prevent the possibility of mistake. The rule requiring the holder of an instrument to account for alterations in it, under pain of nonsuit, does not apply even to equivocal cases: the question must be left to the jury. In *Johnson v. The Duke of Marlborough* (d) and *Henman v. Dickinson* (e), the instruments had obviously been complete

(a) May 4th, before Lord Denman C. J., Patteson, and Coleridge Js.

(b) 2 C., M. & R. 291.

(c) 2 N. & P. 430.

(d) 2 Stark. N. P. C. 313.

(e) 5 Bing. 183.

in a different form from that presented at the trial. In *Bishop v. Chambre* (a) the alteration was grossly fraudulent on the face of it; yet Lord *Tenterden* C. J. left it to the jury;—a course which has been sanctioned by Lord *Lyndhurst* C. B. in *Taylor v. Moseley* (b).

1838.

 KNIGHT
 v.
 CLEMENTS
 and another.

Cresswell and *Crompton*, *contra*. The only safe rule is, that every person taking an instrument on which alterations are apparent, should arm himself with proof that such alterations have been properly made. The acceptor of a bill, altered after negotiation, and without his consent, cannot, of course, be prepared to give any account of the alterations; but every person taking an altered bill has sufficient notice to put him on the inquiry whether or not such bill has been lawfully altered. The general rule as to the onus of proof has not been denied; but it has been argued that the very appearance of this bill afforded a decisive inference to the jury that it was altered before negotiation. If the jury, however, are to draw conclusions from the appearance of an instrument, the onus of proof is in effect shifted; for it is not said that this bill could not possibly have been negotiated before the ink was dry and the alteration was made. Every thing submitted to a jury, without the explanation of which it is susceptible, ought to be in its nature certain; and evidence of the circumstances under which an instrument has been altered, ought never to be dispensed with, unless it be quite impossible that the instrument could have been altered after its completion. The decision in *Bishop v. Chambre* (a) appears to have been misunderstood. In that case there was no alteration at all apparent on the face of the instrument, and the question left to the jury was, whether *in fact* the bill had been altered; with a direction that if, as a matter of fact, they thought it had been altered, it lay upon the plaintiff to account for it. In *Johnson v. The Duke of Marlborough* (c)

(a) Moo. & Malk. 116.

(c) 2 Stark. N. P. C. 313.

(b) 6 C. & P. 273.

1838.

KNIGHT
v.

CLEMENTS
and another.

evidence was given that the bill had not been negotiated before the alteration, although apparently made by the defendant himself.

Cur. adv. vult.

Lord DENMAN C. J., after stating the facts of the case, now delivered the following judgment:—The jury, in this case, found that the alteration was completed in time, and their verdict was entered for the plaintiff, subject to a motion for nonsuit, if the question was improperly submitted to them. This point was argued, and has been considered by us. We think the rule for a nonsuit must be made absolute.

The plaintiff was bound to prove a bill accepted, payable at two months; that which he produced was accepted, payable either at two or three months, with no evidence whether it was the one or the other. The mode of obliteration might have furnished arguments in favour of one or the other supposition, and material confirmation to any proof adduced as to that fact. But, standing by itself, it was obviously no better than a conjecture, for the alteration might have been too late, and accompanied with a fresh marking by wet ink rubbed over on the instant. The case of *Bishop v. Chambre* (a) was cited on the trial for the plaintiff, and the marginal note appears favourable to him. But Lord Tenterden's proceeding on that occasion was in truth the other way; he permitted the jury to inspect the bill, to see if there had been any alteration, which there manifestly had; and then decided against the party producing it, for want of proof that it was made before the instrument was complete.

Rule absolute.

(a) Moo. & Malk. 116.

TRINITY TERM,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,

Lord DENMAN C. J.	PATTESON J.
LITTLEDALE J.	WILLIAMS J.

In the Bail Court,
COLERIDGE J.

GENERAL RULES.

TRINITY TERM, *May 26th*, 1838.

IT IS ORDERED, that in future, in any action against an acceptor of a Bill of Exchange, or the maker of a Promissory Note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

1838.

(Signed by the fifteen Judges.)

WHEREAS it is expedient that certain rules and regulations made in Hilary Term, in the fourth year of his late Majesty King *William* the Fourth, pursuant to the statute of the 3 & 4 *Will.* 4, c. 42, s. 1, should be amended, and some further rules and regulations made pursuant to the same statute.

May 26th.

IT IS THEREFORE ORDERED, that from and after the first day of Michaelmas Term next inclusive, unless Parliament shall in the meantime otherwise enact, the following Rules and Regulations, made pursuant to the said statute, shall be in force.

1838.

1st. IT IS ORDERED, that the 17th and 19th of the General Rules and Regulations, made pursuant to the stat. 3 & 4 Will. 4, c. 42, s. 1, be repealed, and that in the place thereof the two following amended Rules be substituted, viz.—

FOR THE 17th RULE.

Payment of
money into
Court.

When money is paid into Court, such payment shall be pleaded in all cases, and as near as may be in the following form:

Form of.

C. D. } The day of the defendant,
ats. } by his attorney, (or, in person, &c.)
A. B. } says (or, in case it be pleaded as to part only,
add, “as to £ , being part of the sum in the declaration or count mentioned,” or, “as to the residue of the sum of £ ,”) that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of £ , ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages (or, in actions of debt, “that he never was indebted to the plaintiff”) to a greater amount than the said sum &c., in respect of the cause of action in the declaration mentioned, (or, “in the introductory part of this plea mentioned”): And this he is ready to verify: wherefore he prays judgment, if the plaintiff ought further to maintain his action thereof.

FOR THE 19th RULE.

Proceedings
by plaintiff
after payment
of money into
Court.

The plaintiff, after delivery of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit; and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply “that he has sustained damages (or, ‘that the defendant was and is indebted

to him,' *as the case may be*,) to a greater amount than the said sum;" and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

1838.

IT IS FURTHER ORDERED, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of any act of parliament, he shall insert in the margin of the plea the words "by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament, and such memorandum shall be inserted in the margin of the issue, and of the Nisi Prius record.

General issue by statute.

In any case in which the plaintiff (in order to avoid the expense of the plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

Payment credited in particulars of demand need not be pleaded.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Rule not to apply to claim of balance.

Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

Payment in reduction of damages or debt not to be allowed.

(Signed by the fifteen Judges.)

1838.

Thursday,
May 24th.

By an agreement for the sale of certain lands, it was stipulated that the title should be made out to the satisfaction of a third person. A dispute as to the validity of the title was referred to an arbitrator, with power to settle all questions arising out of the agreement, who awarded that the title should be taken with a bond of indemnity, in case of eviction:—Held, that the award was bad, because the arbitrator had exceeded his authority in ordering a bond of indemnity to be taken, and because he had not decided upon the validity of the title.

ROSS v. BOARDS.

BY an order of the Court of King's Bench, on the 31st October, 1835, all matters in difference in an action of trespass between these parties, and all other matters whatsoever in difference between these parties, and the settlement of *all questions on any agreement* existing between them, were referred to an arbitrator.

By agreement, dated the 28th August, 1833, the defendant had agreed to sell the plaintiff certain premises therein described, for the sum of 100*l.*, "the title to be made out to the satisfaction of Mr. *Blunt*." Before the submission of reference, a question had arisen between the said Mr. *Blunt* and the defendant, concerning the validity of the defendant's title to the said premises; and the question was also gone into before the arbitrator, whether or not the defendant's title, as set forth in certain abstracts, was such as the plaintiff and the said Mr. *Blunt* ought to be satisfied with. The arbitrator, as to the said agreement, awarded as follows: "Touching an agreement, the subject of evidence before me, I do award that the said *W. Boards* do, at the expense of the said *R. Ross*, convey to the said *Ross* the title contained in the two abstracts, which have been given in evidence before me, to the parcel of ground particularly specified in such agreement. And I do further award, that the said *W. Boards* shall, at the expense of the said *R. Ross*, execute a bond to the said *R. Ross*, in the penal sum of 200*l.*, to be forfeited in case of the eviction of the said *Ross* from any part of the premises so conveyed as aforesaid, by reason of any defect of the title so to be conveyed as aforesaid."

Sir *J. Campbell* A. G., in Hilary term, 1837, obtained a rule nisi for setting aside the award, on the following grounds:—1. That the arbitrator had exceeded his authority with respect to the agreement mentioned in his award,

and to the estate the subject of the agreement. . 2. That he had not directed whether the title to the said estate was good or bad, or such as the plaintiff was bound to accept. 3. That the award was not final with respect to the questions on the said agreement. 4. That he had directed a bond of indemnity to be accepted by the plaintiff, without deciding as to the title of the said estate. 5. That if the plaintiff should be evicted from the said estate, another suit would arise, and that no sufficient security was given to the plaintiff as purchaser of the said estate.


1838.

 Ross
 v.
 Boards.

Sir *W. W. Follett* now shewed cause. The arbitrator clearly decides that the title is good, for he directs a conveyance. He had power to make a settlement of all questions on the agreement between the parties. He disposes, finally, of these questions, by awarding that the plaintiff shall take the title; and provides an effectual remedy for any eviction, by awarding that the defendant shall give him a bond of indemnity in double the amount of the purchase money. *Fisher v. Pimbley* (a) shews incidentally, that an award of a bond of indemnity, from one party to the other, is not bad for want of finality, if such bond is confined, as in this case, to matters in dispute between the parties to the submission.

Sir *J. Campbell A. G.* and *Shee*, contra. All questions arising out of the agreement were referred to the arbitrator. The only question which had so arisen was, whether "the title, to be made out to the satisfaction of *Mr. Blunt*," was such a title as *Mr. Blunt* ought to have been satisfied with. The arbitrator, instead of deciding upon the validity of the title, directs it to be taken with a bond of indemnity, which rather implies that the title was suspicious and unsatisfactory. The arbitrator has thereby disposed of a question which on the agreement referred to him could never have arisen; for by the terms of the agreement the title was to be satisfactory to *Mr. Blunt*, and nothing is therein said as

(a) 11 East, 188.

1838.

 Ross
 v.
 BOARDS.

to any bond of indemnity. In *Bonner v. Liddell and others* (a), an agreement for a lease of sixty-three years, from May, 1801, was referred to an arbitrator, to give such directions for a lease, according to the agreement, as he should think fit. The arbitrator awarded, among other things, a lease of sixty-three years, from May, 1804, and it was held that he had exceeded his authority, and that his award was bad. The arbitrator in this case has in like manner exceeded his authority, by exceeding the limits of this agreement, which never contemplated that Mr. Ross should take a bad title, patched up with a bond of indemnity.

LORD DENMAN C. J.—I am of opinion that the objection to this award must prevail. The arbitrator has gone beyond the powers given to him, and has not made his award final. Instead of saying whether the title in question is good or bad, he appears to say in effect, “take the title with all its faults;” and he directs a bond of indemnity to be taken also. The award therefore is not final, and instead of settling the difference between the parties, it sets on foot the materials of future litigation.

LITLEDALE J.—It is said that the arbitrator, by directing a conveyance, does in effect decide that the title is good. If this were the only point, I might hesitate in saying that the award is bad, though I rather think it should have proceeded in a direct way, and pronounced upon the title distinctly, and with reference to the terms of the agreement. But the award of a bond of indemnity appears quite unauthorized by the submission of the parties. On the whole, therefore, I think the award bad.

PATTESON J.—The agreement was for a title satisfactory to Mr. *Blunt*. It was never contemplated that Ross should take a doubtful title with a bond of indemnity.

(a) 1 B. & B. 80.

This the award in effect requires him to do, and is a manifest excess of the authority given to the arbitrator, which did not enable him to order generally what should be done between the parties.

1838.

ROSS
v.
BOARDS.

WILLIAMS J. concurred.

Rule absolute.

EMPSON v. FAIRFAX and others.

Friday,
May 25th.

BOMPAS Serjt., in Easter term, 1837, had obtained a rule, calling upon the defendants to shew cause why the nisi prius record in this cause, with the marshal's indorsement upon it, should not be delivered up to the plaintiff, to enable him to prepare the postea, and enter up final judgment thereon, and why it should not be referred to the Master to tax the plaintiff's costs of application, and why such costs should not be added to the costs of the second issue, to be paid by the defendants to the plaintiff.

Where to an action of libel there are pleas of not guilty and a justification, and the defendant gives no evidence of justification, but obtains a verdict on the general issue, the plaintiff is entitled to a verdict and his costs on the plea of justification.

It appeared by the affidavits that this was an action of libel, tried at the sittings in London, after Michaelmas term, 1836, before Lord *Denman* C. J. The pleas were, 1st, not guilty; 2d, a justification. The replications were to the first plea similiter, and to the second de injuriâ. The defendants' counsel called no witnesses on the plea of justification, but addressed the jury with reference to the general issue only. The jury found a verdict for the defendant on the first issue, and the Lord Chief Justice thereupon ordered the verdict to be entered for the plaintiff on the second issue. The postea was delivered to the defendant, and the Master taxed the costs on the second issue in favour of the plaintiff.

Sir *J. Campbell* A. G. and *W. H. Watson*, now shewed cause. The present question is one of considerable importance in practice, and is shortly this: if a defendant

1838.

 EMPSON
 v.
 FAIRFAX
 and others.

pleads not guilty and a plea of justification, and, without giving any evidence of the justification at the trial, succeeds on the first issue, is he bound to pay the plaintiff the costs of the justification? If he is, this absurdity follows; the jury will first of all find that he is not guilty of the libel; and, second, that he did publish the libel of his own wrong and without the cause assigned by him in his plea, for the jury must find in the words of the issue joined. The proper course to be adopted, when the jury find a verdict of not guilty, is for the judge to discharge them as to the second issue, which has become immaterial, as there can be no doubt the judge has this power; *Powell v. Sonnet* (a), *The King v. Johnson* (b), *Cook v. Caldecot* (c). In *Cossey v. Diggons* (d), where in replevin the defendant avowed, stating that the plaintiff held at a certain yearly rent, to wit, 72*l.*, and that rent was in arrear, and the plaintiff pleaded in bar, 1*st*, *non tenuit*; 2*d*, *riens* in arrear; and the jury found, first, *non tenuit*; and second, that there was a certain sum due for arrears; it was held that the proper course would have been to have discharged the jury from finding any verdict on the second issue, but that even upon the second finding the verdict must be entered for the plaintiff. In *Dibben v. Marquess of Anglesea* (e), the power of a judge to discharge the jury was fully recognized, and the decision in *Cossey v. Diggons* (d) was cited by the Court. *Spencer v. Hamerton* (f) may be cited on the other side, and, no doubt, if the verdict had been actually entered up for the plaintiff on the second issue, he would be entitled to costs. [Patteson J. In the second plea the defendant confesses the cause of action, and pleads a justification; suppose there had been only that plea, and he had offered no evidence upon it, the plaintiff would have been entitled to his verdict without further proof; what difference then can it make

(a) 1 Bligh, N. S. 545; S. C. 11

B. Moore, 330.

(b) 5 A. & E. 488.

(c) 4 C. & P. 315.

(d) 2 B. & Ald. 546.

(e) 2 C. & M. 722-42.

(f) 6 N. & M. 22.

that there are several pleas?'] When there is only one plea, and the *onus probandi* is on the defendant, if he brings no proof, of course the verdict must go against him; but when not guilty is pleaded, the burden of proof is thrown on the plaintiff; and if he fails in establishing his case, the defendant is not called upon to go into his justification. If the Court should hold otherwise, it will produce this most inconvenient practice, that a defendant must go into evidence on a variety of pleas, merely with a view to costs, although the jury are satisfied that the plaintiff has not established his cause of action. The case of an action for debt, where the defendant pleads the general issue and a set-off, is a strong illustration, that when the general issue is found for the defendant, the second plea becomes immaterial, and the jury should be discharged therefrom; for otherwise there is nothing to which the set-off applies; and yet a verdict for the plaintiff on that plea would be a bar to an action at the suit of the defendant for a debt, which he might have proved under the set-off.

Bompas Serjt. (with whom were *Humfrey* and *Hughes*) *contra*, was stopped by the Court.

LORD DENMAN C. J.—The argument for the defendant, in my opinion, goes a great deal too far, for, if correct, it establishes that the judge who tries the cause is not only at liberty, but that he is bound to discharge the jury in such case. I do not think that is so. There is certainly some incongruity in the finding which a *postea* will present, when the verdict is for the defendant on the issue of not guilty, and for the plaintiff on the plea of justification; but the substance of the pleading by the defendant is, I did not publish the libel in question, and whether I did or not I was perfectly justified, because it is all true; the jury may very well find that the defendant did not publish the libel, but that the justification he has put upon the record is a tissue of falsehoods. If this is an obvious and

1838.

 EMPSON
 v.
 FAIRFAX
 and others.

1838.

EMPSON
v.
FAIRFAX
and others.

rational explanation of the finding of the jury, we are bound to give effect to it, and it would be the height of injustice to a plaintiff that a false justification should be put on the record, of which not an iota of proof should be given, and yet that a verdict should be given against him upon it.

LITLEDALE, PATTESON and WILLIAMS Js. concurred.

Rule absolute (a).

(a) See rule, Hil. T. 2 Will. 4, no. 74.

Saturday,
May 26th.

GREEN v. SALMON.

The estate of a deceased is always liable for the reasonable expenses of his funeral, and can in no event be liable beyond them. Therefore a residuary legatee is not incompetent to prove that his testator's funeral, which exceeded the cost chargeable upon the estate, was furnished to the order of a stranger, on the ground that the tendency of his evidence is to relieve the estate.

ASSUMPSIT to recover the amount of an undertaker's bill, for burying the mother of the defendant. The cause was tried at the sittings during this term, before *Coleridge J.*, when it appeared that the action was brought against the defendant, as liable in his individual capacity for the expenses of the funeral, which was alleged to have been furnished at his express request. To prove the plaintiff's case, a witness was called, who had married one of the daughters of the deceased, a residuary legatee under her mother's will. He was objected to as incompetent, on the ground of his interest to increase the residuary estate, by relieving it from the funeral expenses, and casting them upon the defendant. The learned judge overruled the objection; and a verdict was found for the plaintiff for the full amount of his bill, 46*l.* 19*s.* 4*d.*

Alexander now moved for a new trial, on the ground of the misreception of the evidence. [Lord *Denman C.J.* There are two causes pending in the Exchequer, *Burckhardt v. Hall* and another case, which are connected with this subject. *Littledale J.* also referred to *Nowell v. Davies and another (a)*.] *Brice v. Wilson (b)* and *Rogers v.*

(a) 5 B. & Ad. 368; S.C. 2 N. & M. 745.

(b) 3 N. & M. 512.

Price (a) may be mentioned as authorities on the ordinary liability of the deceased's estate for funeral expenses (b). [*Patteson* J. The funeral expenses in this case were more than would be allowed an executor.]

1838.
GREEN
v.
SALMON.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in this term (June the 2nd), delivered the judgment of the Court:—

In this case the husband of a residuary legatee was called by the plaintiff, an undertaker, to prove that defendant had expressly employed plaintiff to conduct the funeral of defendant's mother, at a cost of about 46*l.* The question is, whether the witness was not interested to relieve the residuary estate of the deceased by charging the defendant. We think he was not, for the estate must, at all events, pay the reasonable expenses of the funeral, and can in no event be liable beyond them.

Rule refused.

(a) 3 Y. & J. 28.

(b) See also *Tugwell v. Heyman*, 3 Campb. 297. This and the cases cited shew that an executor is lia-

ble for a funeral suitable to the degree of the deceased, although furnished by the order of a third person.

In re ———.

Monday,
May 28th.

SIR W. W. FOLLETT moved to strike an attorney off the rolls, on an affidavit, disclosing that the attorney had been retained on the part of a plaintiff to conduct an action for libel. At the trial a verdict for 40*s.* was taken by consent. The bill of costs brought in by the attorney amounted to 1150*l.*, of which sum 374*l.* was charged for the expenses of witnesses. On taxation by the Master, the whole sum was reduced to 370*l.*; and the sum of 374*l.*, sworn to as the expenses of witnesses, was reduced to 47*l.*

The Court will not strike an attorney off the rolls, on an affidavit alleging a distinct case of perjury, unless enough appear on his own admission to render the interposition of a jury unnecessary.

1838.

In re

On these grounds it was contended that the Court would exercise their summary jurisdiction.

Lord DENMAN C. J.—Would not an indictment for perjury lie upon these facts? We are not in the habit of interposing in such a case, unless there is something amounting to an admission on the part of the attorney, which would render the interposition of a jury unnecessary.

Sir *W. W. Follett* stated there was enough in the affidavit to shew a distinct case of perjury; but that there was no admission.

Per CURIAM,

Rule refused.

Tuesday,
May 29th.

SLACK v. SHARP.

1. Where a tenant, at a rent payable half-yearly, against whom a fiat of bankruptcy issues during a current half-year, delivers up possession of the premises to his landlord, according to 6 *Geo. 4*, c. 16, s. 75, he is not liable in assumpsit for his use and occupation for the portion of the half-year prior to the fiat.

ASSUMPSIT for use and occupation. The pleadings raised the same question, which was submitted to the opinion of the Court, under the 3 & 4 *Will. 4*, c. 42, s. 25, in the following special case:—

The defendant was tenant to the plaintiff of certain premises, from the 1st of January, 1833, until the time of the bankruptcy and fiat hereafter mentioned. The tenancy was from year to year at the rent of 50*l.*, payable on the 6th of April and the 6th of October in every year. On the 25th day of March, 1834, the defendant committed an act of bankruptcy, and on the 31st day of March, 1834, a fiat in bankruptcy was duly issued against him. The defendant duly made application to the assignees to accept the said premises, which they declined; whereupon the defendant did, within fourteen days after notice of such refusal, conformably to the statute, duly offer to deliver up possession of the said premises to the plaintiff on the 5th of April, 1834, and the plaintiff accepted the possession on the 7th of April, 1834. The plaintiff seeks to recover from the defendant compensation for the defendant's enjoyment of

2. A tenant under a parol agreement is within the protection of this section.

the said premises from the 6th of October, 1833, until the issuing of the fiat on the 31st of March, 1834. If the Court shall be of opinion that the plaintiff is entitled to a verdict, the rent is to be considered the measure of damages, in proportion to the time of occupation.

In the margin the following statement was given of the question:—Whether, in the case of a tenant from year to year, who becomes bankrupt, and has a fiat issued against him in the middle of a quarter, and who afterwards delivers possession to his landlord under the statute, any thing is payable to the landlord for the occupation before the bankruptcy or fiat.

1838.

 SLACK
 v.
 SHARP.

Wightman, for the plaintiff. The 75th section of the 6 Geo. 4, c. 16, provides "that any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the lord chancellor, who may order them so to elect and deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit." Were it not for this clause in the Bankrupt Act, the cases of *Auriol v. Mills* (a) and *Boot v. Wilson* (b) would be decisive in favour of the plaintiff.

(a) 4 T. R. 94; S. C. 1 H. Bl. 433.

(b) 8 East, 311:

1838.

SLACK
v.
SHARP.

In the former case it was held that the bankruptcy of the lessee is no bar to an action of covenant for rent against him. *Boot v. Wilson* (a) is equally favourable, and more in point, because it was an action of assumpsit. It was there held that assumpsit lies against a lessee, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued; and it was settled by *Tuck v. Fyson* (b), in confirmation of *Copeland v. Stephens* (c), that the term of a bankrupt lessee remains vested in him until either the assignees elect to take it, or until he himself delivers it up under the clause of the Bankrupt Act just cited. Now the plaintiff does not seek to recover any rent accruing after the bankrupt delivered up possession, but a certain portion of rent, pro ratâ, for the period while the bankrupt had the term vested in him and occupied the premises, namely, from the 6th October, 1833, until the 5th April, 1834. Unless the defendant be made liable, the landlord of a bankrupt tenant may always be defrauded by the assignees deferring to elect until the very day before quarter-day. This action is not brought on the reddendum of a lease, but simply to obtain a recompence for the defendant's actual occupation: so that there can be no objection on principle to holding the defendant liable for so much occupation as he has had, although his occupation would, but for circumstances which neither party could control, have been extended to a much longer period. [*Patteson J.* If tenant for life, without power of leasing, makes a lease, and dies before the expiration of it, his executor could not recover a proportionate part of the rent independently of the statute, (11 Geo. 2, c. 19, s. 15.) *Littledale J.* In many cases where arable land is demised, no benefit whatever is derivable to the tenant, except at a particular period of the year. Why should he be liable pro ratâ?] The clause in the Bankrupt Act, which says

(a) 8 East, 321.

(c) 1 B. & Ald. 593.

(b) 6 Bing. 321.

that the bankrupt shall not be liable after he has delivered up possession, may mean by implication that he shall be liable, *pro ratâ*, up to that time; for if the clause did not protect him, he would of course be liable for the whole term. The clause was intended for the benefit of landlords rather than bankrupts: it was found to be a great grievance that there was no mode of putting an end to the term of a tenant who was unable to pay rent.

1838.

SLACK
v.
SHARP.

Ogle, *contra*. The clause was intended for the benefit of the bankrupt, and to supply an omission in the 49 *Geo. 3*, c. 121, s. 19, which had the same object in view, but was ineffectual, inasmuch as it only exonerated him in case his assignees should elect to take the lease. If therefore the assignees, who had taken all his other property, did not elect to take his lease also, he might be liable for a heavy rent in respect of a farm, which he could not cultivate for want of capital. It is the landlord's own fault if the election of the assignees is delayed until the day before quarter-day, for it is his duty to put them in motion. In *Tuck v. Fyson* (a) it was merely decided that the protection of this clause is personal to the bankrupt, and is not to be extended to his surety. Where parties have entered into an express contract, no other can be implied. By the terms of the contract between these parties, no rent was to be paid except at particular periods; none therefore can have "accrued" at any other period. There was an express contract in this case, which has been rescinded by the bankrupt laws. So in *Grimman v. Legge* (b) a dispute took place between the landlord and tenant, and their contract having been rescinded before the quarter-day on which the rent was payable, it was held that no rent *pro ratâ* could be recovered in respect of the actual occupation for a period short of the quarter. Nor can freight be recovered *pro ratâ*, where, by the terms of the charter-party, the cargo is

(a) 6 Bing. 321.

(b) 8 B. & C. 324; 2 Mann. & R. 438.

1838.

SLACK
v.
SHARP.

to be delivered at a particular place, if the ship be wrecked before the completion of the voyage, although the freighter received possession of his goods undamaged at an intermediate place, and sold them (a). In *Thomas v. Williams* (b), where a clerk, who was hired for a year, continued in the service of his master after he had become a bankrupt, the clerk recovered a rateable part of his salary, although the contract was rescinded in the middle of the year by consent; but that case must have been so decided on the ground that there was an understanding between the parties, after the issuing of the commission, that the clerk should be paid rateably for his services.

Wightman, in reply. There is no reason, on principle, why apportionment may not be made in the present case in favour of the landlord, by analogy to the apportionment made in favour of a tenant, on his eviction from part of the land (c). Apportionment certainly seems to apply rather to eviction from part of the premises than from part of the term. But the principle upon which apportionment is allowed, namely, that it is unjust that the tenant should pay for that which he has not enjoyed, will apply to one sort of eviction as well as another; and if applied to time in the case of a tenant, it ought also to be applied to time in the case of a landlord, to whom it would be a great hardship not to be remunerated for the period during which he has been kept out of the enjoyment of his land. A tenant for life, without power of leasing, might provide that in case of his death a proportionable part of the half-year's rent should be payable by his lessee. But the plaintiff has shewn no want of foresight in not providing for such a payment, in the event of the defendant becoming a bankrupt, for the defendant might not even have been a trader at the time of the lease. *Thomas v. Williams* (b) is much in the

(a) See *Cook v. Jennings*, 7 T. R. 381.

(b) 1 Ad. & El. 685; S. C. 3 N. & M. 545.

(c) See, as to apportionment, *Ex parte Smyth*, 1 Swanst. 337, and a learned note by the reporter.

plaintiff's favour: there the clerk, without any understanding to this effect with his employer, recovered salary *pro rata*, after the rescision of an express contract, by which salary was to be paid for a year's service. If the law has rescinded the contract in this case, the plaintiff should in like manner be paid rateably: it is quite immaterial that this contract was rescinded by law, and not by consent, as in *Thomas v. Williams* (a). The true principle on which assumpsit for use and occupation proceeds, is explained in 2 *Selwyn's Nisi Prius*, 1406 (8th ed.) "Under this statute" (11 *Geo. 2*, c. 19, s. 14), he says, "a landlord who has rent owing to him, is allowed to recover, not the rent, but an equivalent for the rent,—a reasonable satisfaction for the use and occupation of the premises, which have been holden and enjoyed under the demise." This principle gets rid of any difficulty presented by the doctrine of apportionment. Thus, in *Tomlinson v. Day* (b) it was held, that, as the action for use and occupation was to recover compensation in damages, the jury were not bound to give the exact rent reserved by the terms of an agreement.

1838.


 SLACK
v.
SHARP.

Lord DENMAN C. J.—In this case a fiat of bankruptcy having issued against the defendant, who was tenant from year to year to the plaintiff, of certain premises, at a rent payable half-yearly, on the 6th April and the 6th October, and the defendant's assignees having declined to accept the premises, the defendant delivered up possession of them to the plaintiff, according to the statute, on the 5th April. The question is, whether the defendant is liable for any portion of the rent, for his occupation between the 6th October and the 5th April. The 75th sect. of the Bankrupt Act provides that "any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any *rent accruing* after the date of the commission, or to be sued in respect of any subse-

(a) 1 Ad. & El. 685; S. C. 3 (b) 2 B. & B. 680.
N. & M. 545.

1838.

SLACK
v.
SHARP.

quent non-observance or non-performance of the conditions, covenants or agreements therein contained; and, if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant the lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid." It has not been argued whether a parol contract from year to year is within this section; but we think such a contract, although not within the letter, is within the scope and spirit of the act.

The question then, whether the defendant in this case is liable, appears to depend on the meaning of the words "rent accruing due" after the date of the commission. This is no question at all in truth; for as no rent was payable until the 6th April, none had accrued due on the 31st March, when the fiat issued; and the defendant is entitled to judgment.

LITLEDALE J.—I am of the same opinion. Although the statute says, "deliver up lease or agreement," I think we should construe this provision, which was intended for the benefit of tenants, too narrowly, if we were not to apply it to parol contracts.

Would then the rent in this case, if the statute had not interposed, accrue due after the fiat? The rent was an entire thing, to be paid on the 6th April: it would have accrued due on that day; but no part of it accrued on any previous day. At the time of the fiat, therefore, nothing had accrued due; and the bankrupt is exonerated from any that would otherwise accrue due at any subsequent time: the landlord therefore is entitled to nothing. All the cases of apportionment mentioned under that head in *Viner's Abridg.* are cases of apportionment of the rent in respect of the quantity of the land, and not of the time during which it has been held (*a*).

(*a*) See *Clun's case*, 10 Rep. 128 a. "If the land is evicted, or if the lease determines before the legal time of payment, no rent

PATTERSON J.—I agree that a parol contract is within the statute. We have, I think, merely to decide as to the meaning of “rent accruing due.” Rent, I apprehend, where any time is fixed by the parties for its payment, accrues due at that time, and no other; although, where no time is fixed, it accrues due *de die in diem*, like interest. In this case the 6th April was the time fixed for its accruing due, before which time the fiat had issued against the defendant; so that by taking the steps pointed out by the 75th section, he was able to exonerate himself from all liability. It was said, in the course of the argument, that the assignees must be set in motion by the landlord to make their election. That does not appear to me to be so. The landlord may call upon the assignees to elect, if he pleases, but he is not bound to do so. The bankrupt also may call upon them to elect, or they may elect of their own accord.

1838.

SLACK
v.
SHARP.

WILLIAMS J.—Mr. *Wightman* felt the pressure of the case, when he endeavoured to prove that some rent was actually due at the time of the fiat. That question admits of an easy solution by reference to the terms of the contract, by which no rent was to be due until the 6th April. The doctrine of the Court in *Grimman v. Legge* (a) applies. If we were to say that any rent was payable *pro ratâ* in this case, we should frame a new contract for the parties.

Judgment for defendant.

shall be paid; for there shall never be an apportionment in respect of part of the time, as there shall be

upon an eviction of part of the land.”

(a) 8 B. & C. 324; 2 Mann. & R. 438.



1838.

Tuesday,
May 29th.

WHITWILL v SCHEER.

1. In an action on a charter-party where the contract is set out at length, and a promise is added as a formal statement of the legal effect of the contract: Held, that the judge at nisi prius was right in ordering an amendment to be made, stating the legal effect correctly, although the defendant made an affidavit that he went down to try the issue contained in the averment ordered to be amended.

2. *Quere*, whether, after setting out the whole of a contract and averring mutual promises, it is necessary to state any additional implied promise, according to the legal effect of the whole contract.

ACTION on a charter-party for not furnishing a cargo. The declaration stated, that by a charter-party made between the plaintiff and defendant, on the 17th August, 1832, it was agreed that the plaintiff's ship should, with all convenient speed, after delivering her then present cargo at Alexandria, proceed, either in ballast or in goods, to Constantinople for orders, whether she should load at Odessa, or at a safe port in the Crimea, and there, to wit, at Odessa, or at some safe port in the Crimea, load from the factors of the defendant a full and complete cargo; and that being so loaded, she should therewith proceed to Falmouth or Cork, at the master's option, for orders to discharge at a safe port in Great Britain, &c.; that by a certain memorandum subscribed on the charter-party, it was declared that the said ship was to be addressed to Messrs. *L. Stieglitz* and Co., Odessa, and that, should the vessel not arrive at Constantinople aforesaid before the 15th November then next, the defendant's agents were to have the option of annulling the said contract. The declaration then averred mutual promises, and that the defendant promised (a) [there should be some factor, agent, or assign of the said Messrs. *Stieglitz*, or of the defendant at Constantinople aforesaid, to give orders to the plaintiff, whether the said vessel was to load at Odessa or at some safe port in the Crimea; or, in the event of the vessel not arriving at Constantinople aforesaid until after the said 15th day of November, to exercise the option given by the said charter-party to annul the said contract, and that such option should be exercised within a reasonable time after the arrival of the said vessel at Constantinople aforesaid, and notice thereof to the agents, factors, or assigns of the said Messrs. *L. Stieglitz*, or the defendant at Constantinople, in the event of the said vessel not arriving at Constantinople until after the said 15th day of November.] The declaration then averred performance, and that the vessel arrived

(a) The declaration, as first delivered, was without the passage in brackets.

1858.


 WHITWILL
 v.
 SCHERER.

at Constantinople after the 15th November, to wit, on the 10th December then next following, and was then ready to proceed either to Odessa or to &c., as he should be ordered by Messrs. *Stieglitz*, their factors, agents, or assigns at Constantinople, or the defendant or his factors, agents or assigns at Constantinople, and there, to wit, at Odessa or &c., to receive on board a full cargo, &c. Averment, that plaintiff did, on the arrival of the said ship at Constantinople, make due and diligent search to find out Messrs. *Stieglitz*, or their and the defendant's agents at Constantinople, for the purpose of receiving orders, &c., and of learning whether the agents of the defendant would exercise the option given by the charter-party of annulling the said contract, but could not discover the agents, &c. Averment, that the ship remained at Constantinople, waiting for orders, till the 1st February, 1859, when the plaintiff received notice from Messrs. *Stieglitz*, that in consequence of the arrival after the 15th November, they cancelled the said charter-party. Averment, that the said notice was not given in a reasonable time after the arrival of the said vessel at Constantinople. Averment of the plaintiff's readiness to perform, &c. Breach, that by reason of the neglect and default of the defendant in not having at Constantinople aforesaid, the said Messrs. *Stieglitz*, or some agent on their behalf, or on behalf of the defendant, or some proper person to give the plaintiff the orders, &c., and there being no such agent to give such orders as aforesaid, and of the refusal of Messrs. *Stieglitz*, and of such option not being exercised, he, the plaintiff, was hindered and prevented, &c. (setting out special damage).

Pleas:—1. Non assumpsit; 2. that the notice was given in reasonable time; 3. that the vessel did not wait at Constantinople, waiting such orders as aforesaid, from the time of her arrival at Constantinople for a reasonable time, modo et formâ.

At the trial at Guildhall, at the sittings after Hilary term, 1857, before Lord *Denman* C. J., it appeared that

1838.

WHITWILL
v.
SCHEER.

the vessel did not arrive at Constantinople till the 10th December. The ship's arrival was officially announced in the shipping list of the port of Constantinople on the 11th December. On the 15th December the plaintiff advertised the arrival of the vessel in the Ottoman Moniteur, and, on the 9th of January, Messrs. *Stieglitz* wrote from Odessa to cancel the charter-party, which the plaintiff received on the 1st February, and he proved that there was no direct post from Constantinople to Odessa.

The charter-party contained the following memorandum, indorsed upon it :—" The ship to be addressed to Messrs. *Stieglitz & Co.*, Odessa. The charterer not to be responsible for detention by frost, unless his agents have twenty clear days for loading, after the arrival of the vessel, before the frost sets in. *Should the vessel not arrive at Constantinople before the 15th November, the charterer's agents to have the option of cancelling this contract.*"

At the close of the plaintiff's case *Kelly*, for the defendant, contended, that the promise by the defendant, laid in the declaration, to have an agent at Constantinople to give orders, was not proved, and therefore that the plaintiff should be nonsuited; but his lordship thought an amendment might be made under the 3 & 4 *Will.* 4, c. 42, and ordered that the plaintiff should have leave to amend, subject to the opinion of this Court, whether and on what terms the amendment should be made, and giving the defendant leave to enter a nonsuit.

The plaintiff amended the declaration by substituting, instead of the promise above set out in brackets, the following promise :—" That the said defendant or the said Messrs. *Stieglitz* and Co. should, within a reasonable time after the arrival of the said vessel at Constantinople, and notice thereof given, give, or cause to be given, orders to the said plaintiff whether the said vessel was to load at Odessa aforesaid, or some safe port in the Crimea; or in the event of the said vessel not arriving at Constantinople aforesaid until after the 15th November, in the said charter-party mentioned, should, within a reasonable time after such

arrival and notice, communicate to the said plaintiff the exercise of the option given by the said charter-party to annul the contract.”]

Kelly, for the defendant, then addressed the jury on the facts of the case, and the verdict was found for the plaintiff—damages 104*l*.

Kelly, in Easter term 1837, obtained a rule nisi to enter a nonsuit, or that the Court should make such order in the cause as they should see fit. The affidavit upon which he obtained this rule stated, that the declaration first delivered in this cause (*a*), in November, 1834, contained no mention of the memorandum in the charter-party authorizing the defendant to cancel the contract, and that the defendant, in one of his pleas, set out the memorandum, and averred that the defendant had exercised his option by cancelling &c., within a reasonable time. The plaintiff then obtained an order for leave to amend his declaration, and, after two amendments, ultimately delivered the declaration in the form as first above set out (*a*). The affidavit then stated, that the defendant understood a principal ground of complaint intended to be insisted on by the plaintiff was, that there was no agent of the defendant's at Constantinople to whom the plaintiff could cause notice to be given of his arrival, and the defendant insisted that he was not bound to have such agent at Constantinople, and that he went to trial in the expectation that his liability to have an agent at Constantinople would be the main question to be tried.

Sir *W. W. Follett* (with whom was *Petersdorff*) on a former day (*b*) in this term shewed cause. The only question between the parties on this record was, whether notice to annul the contract was sent to the plaintiff in reasonable time, or not. The jury have decided that question in

(*a*) See the passage in brackets, *man C.J., Littledale, Patteson, and ante*, 398. *Williams, Js.*

(*b*) May 25, before Lord Den-

1838.

 WHITWILL
 v.
 SCHERR.

1838.

 WHITWILL
 v.
 SCHREER.

his favour; the question now for the Court is, whether the plaintiff is to be deprived of his verdict by the operation of the new rules. Before the new rules he would have had no difficulty, as the contract would have been described in different ways, but now, as he is restricted to one count, the Court must decide whether, when the whole contract is set out in the declaration, and the legal effect of it is stated incorrectly, the Court will not amend so as to let the jury decide on the merits of the case, no injury thereby accruing to the other side.

It is submitted that the rule must be discharged; 1st, because the judge had power to make the amendment; or, 2d, because the averment was immaterial, and therefore might be struck out.

First point:
 If the legal
 effect of a con-
 tract is incor-
 rectly stated,
 amendment
 may be made
 under 3 & 4
Will. 4, c. 42.

I. By the charter-party power is reserved to the defendant to annul the contract if the vessel arrived at Constantinople after the 15th November. The vessel, in fact, did arrive at Constantinople after the 15th November, and the plaintiff alleges in his declaration, that there is an implied contract on the part of the defendant, arising out of the charter-party, to have some agent at Constantinople to give notice whether he would annul the contract or not. The defendant contends that it was not necessary for him to have any such agent at Constantinople, for that the vessel being addressed to Messrs. *Stieglitz*, at Odessa, it was competent to them to send by letter a notice to Constantinople, declaring their option as to annulling the contract, and therefore that the plaintiff had mis-stated the contract. It is apparent that this controversy is only verbal, the main point in issue being whether the defendant sent notice to annul the contract in reasonable time, or not, as it was immaterial to the plaintiff how, or by whom, that notice was given. The judge therefore might amend under 3 & 4 *Will.* 4, c. 42, *Moilliet v. Powell* (a), *Hemming v. Parry* (b), *Parry v. Fairhurst* (c), *Hanbury v. Ella* (d), *Parks v.*

(a) 6 C. & P. 233.

(b) 6 C. & P. 580.

(c) 2 C., M. & R. 190.

(d) 3 N. & M. 438.

Edge (a), Guest v. Elwes (b). [*Patteson J.* Have you looked at *Lamey v. Bishop?* (c)] That was a case under the 9 Geo. 4, c. 15, s. 1, and there also the Court allowed the amendment. If the defendant rested his defence entirely on the answer he was able to give to that part of the declaration which required amendment, he might have made affidavit of the fact; but he elected to go to the jury on the merits of the case, which were not at all affected by the amendment. [*Patteson J.* The declaration avers that no notice was given in reasonable time, and this, together with the averment of mutual promises, would seem to be sufficient without any further promise.]

1838.

 WHITWILL
 v.
 SCHEER.

II. The declaration originally stood thus, but from too abundant caution an amendment was made, inserting the promise, to have an agent at Constantinople, which has caused all the difficulty. No such promise, however, is necessary, and therefore the whole may be struck out as immaterial, and consequently the defendant cannot be injured by the amendment.

Second point:
 The legal effect
 of the contract
 need not be
 averred in the
 declaration,
 when the ac-
 tual contract
 is set out.

C. Cooper, contra. I. The averment as to the agent at Constantinople was material. The defendant contended at the trial, that there was no promise, express or implied, by the defendant to have an agent at Constantinople, and that a letter announcing the option would have been sufficient. The declaration treats the averment as material, for it does not simply state that notice was not given in reasonable time, but the allegation is mixed up with, and depends on, the averment of the defendant's promise to have an agent at Constantinople for the purpose. If that promise is struck out, the averment as to reasonable notice goes too; so that the striking out the defendant's promise to have an agent there, together with the consequent alteration necessary in the breach, change the whole cause of action. This appears

Second point.

(a) 1 C. & M. 429.

(c) 4 B. & Ad. 479; 1 N. & M.

(b) 5 A. & E. 118; 6 N. & M. 332.

1838.
 WHITWILL
 v.
 SCHEER.

further by a provision in the charter-party, that the vessel, on her homeward voyage, should proceed to Falmouth or Cork for orders to discharge; is it contended that this raises a promise by the defendant to have an agent at Falmouth or Cork to give orders on the arrival of the vessel? If not, why does the implied promise arise as to Constantinople?

First point.

II. The present amendment does not fall within any of the cases cited. They are all cases in which mis-statements had been made, not material to the merits of the cause. In the present instance, an independent promise is alleged, which does not arise out of the contract. The defendant distinctly states in his affidavit, that he understood the principal question to be tried was, his liability to have an agent at Constantinople. It cannot be said, therefore, that he is not prejudiced by the amendment. In *Doe v. Errington* (a), where ejectment was brought on a joint demise, and it appeared that the two lessors of the plaintiff were tenants in common, who could not join in a demise in ejectment, *Taunton J.* refused to amend, because he considered the nature of the lessor's title was a question affecting the merits of the case. So in *Frankum v. The Earl of Falmouth* (b), *Alderson B.* refused to amend, because the amendment would amount to an alteration of the issues, which is the case here.

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This is a question under 3 & 4 *Will.* 4, c. 42, s. 23, as to the power of the judge to amend, and the exercise of that power. We are of opinion that the power existed, and was properly exercised.

The declaration set out the charter-party on which the action is brought, with certain memoranda indorsed. It then alleged mutual promises, and, perhaps unnecessarily, added a promise on the part of the defendant, to have an

(a) 1 A. & E. 750; 3 N. & M.
 646; 1 Moo. & Rob. 343.

(b) 2 A. & E. 452; 4 N. & M.
 330.

agent at Constantinople in order to exercise the options given by the charter-party and memoranda. The defendant pleaded, amongst other things, non assumpsit. The proof of the contract consisted of the charter-party and memoranda only. If the added promise, as to having an agent, was intended by the declaration to apply to some contract not contained in, but beyond and in addition to the charter-party, here was plainly a variance, which could only be cured by striking out the added promise altogether, which however could hardly have been done, inasmuch as the added promise would then have been material to the merits of the case.

But if, as was evidently the case, the added promise was intended merely as a formal statement of the legal effect of that which is contained in the charter-party and memoranda, and that statement is wrong, there is still equally a variance in the statement of the contract, which might be cured either by striking out the added promise altogether, or by stating the legal effect properly. The latter course was adopted, and we think rightly. The merits of the case were not affected by the alteration, and the statement of the legal effect, although it may not be necessary after setting out the whole written contract, and alleging mutual promises, is nevertheless correct. If not, the defendant has the opportunity of trying that point upon a writ of error, after having attempted a defence upon the merits on the other pleas.

Rule discharged.

1838.

WHITWILL
v.
SCHEER.



1838.

Wednesday,
May 30th.

The QUEEN v. The Inhabitants of ABERGELE.

A Court of Quarter Sessions having quashed an order of removal, and refused to state a case for the opinion of the Q. B., a writ of certiorari was obtained to bring up their order. The clerk of the peace returned the orders and notices, and a statement of the facts relating to the appeal, by which it appeared that the notice of the grounds of appeal sent under the 4 & 5 Will. 4, c. 76, s. 81, was defective. A rule having been obtained to quash the order of sessions, and to confirm the original order, the Court of Q. B. discharged the rule, as there was no precedent for such a course of practice.

A CERTIORARI having been obtained for removing into this Court all and singular the orders made on an appeal touching the removal of *Evan Evans*, between the inhabitants of Eglwys Rhos, otherwise Llanehos, in the county of Carnarvon, and the inhabitants of Abergele; the clerk of the peace of the said county made a return to the certiorari, setting out the original order of the two justices, the notice of the grounds of appeal against the order (which was bad on the face of it), and the order of the Carnarvonshire sessions (which was good on the face of it), quashing the original order, and also setting out the facts of the case.

Humfrey, in Easter term, upon affidavits which disclosed that the notice of the grounds of appeal required to be sent under 4 & 5 Will. 4, c. 76, s. 81, was bad, obtained a rule, calling upon the defendants to shew cause why the order of sessions, made on the above appeal, quashing the order of two justices, should not be quashed for the insufficiency thereof, and the said original order of justices confirmed.

By the affidavit filed in answer, it appeared that the objection to the notice had been taken at the quarter sessions, and overruled, and that a case to this Court had been refused.

W. H. Watson now shewed cause, and contended that as the sessions had stated no case, and had not asked the opinion of the Court, the point intended to be raised could not be brought before the Court. The Court thereupon called on

Humfrey, contra. The clerk of the peace has in this case returned all the orders and proceedings, with the facts, as they occurred. Being the servant to the Court, to whom the certiorari is directed, such a return is equivalent to ask-

ing the opinion of this Court. The writ of certiorari directs the Court below to send up all orders with all things belonging and appertaining thereto. This direction has been complied with, and the case comes before the Court analogously to other orders of sessions, brought up on certiorari. [*Patteson J.* When the sessions state a case, they only send up a qualified order, which is moulded here according to the legal result of the facts stated; but in this case the sessions have made an unconditional order.] The other side might have moved to quash the return.

1838.

 The QUEEN
 v.
 Inhabitants of
 ABERGELE.

LORD DENMAN C. J.—In the absence of any authority, I think the course which has been adopted here is wrong. It would be a departure from the usual practice, and an introduction of a precedent full of inconveniences for the future. The rule must be discharged.

Humfrey objected to the discharge of the rule, as the notice was clearly bad.

PATTESON J.—If a motion were made now to quash the return for its introduction of impertinent matter, on the next return being made, the order of sessions only would be brought up; but that being good on the face of it, would be confirmed. The same result arises from discharging the rule.

LITTLEDALE and WILLIAMS Js. concurred.

Rule discharged (a).

(a) See *The Inhabitants of Weston Rivers v. St. Peter's in Marlborough*, 2 Salk. 492, where the

Court held they could not notice any thing in the return to a certiorari, but the order itself.



1838.

Wednesday,
May 30th.

An order of removal is bad, unless the removing parish serve a notice of chargeability, together with a copy of the order of removal, on the other parish.

The QUEEN v. The Inhabitants of BRIXHAM.

UPON an appeal against an order of two justices, for the removal of *Elizabeth Thomas* from the parish of Formoham to the parish of Brixham, in the county of Devon, the sessions confirmed the order, subject to the opinion of the Court upon the following case:

An order was made by two justices of the county of Devon, dated the 7th day of October, 1836, for the removal of *Elizabeth Thomas* from the parish of Formoham to the parish of Brixham, in the county of Devon. A copy of the order of removal, and a copy of the examination upon which the order was made, was served on the parish officers of Brixham, on the 7th day of October, 1836, by the overseers of the parish of Formoham, but no notice in writing of the said *Elizabeth Thomas* being chargeable to the said parish of Formoham, or relieved therein, was sent together with the said notices, by the overseers or guardians of the parish of Formoham, to the overseers of the parish of Brixham. On the 25th day of October, 1836, the parish officers of Brixham gave notice of appeal against the above order of removal, and on the 2d day of December following sent to the overseers of the parish of Formoham a statement in writing, under their hands, of the grounds of their appeal. The two grounds first stated related to the settlement of the pauper, and the last stated was, that the overseers of the parish of Formoham had omitted to send with the before-mentioned order of removal, any notice of the said *Elizabeth Thomas* having become chargeable to, or having been relieved by, the parish of Formoham, as directed by the 79th section of stat. 4 & 5 Will. 4, c. 76. Upon the hearing of the appeal, the counsel for the appellants contended that the respondents were bound to prove that they had given the above notice. The Court of Quarter Sessions were of opinion that the omission to send the above notice with the copy of the order was not any ground for quashing

the order, and after hearing evidence and counsel on the other grounds of appeal, confirmed the order of removal, subject to the opinion of this Court, on the question whether the omission to send the notice of chargeability as above was a ground for quashing the order.

1838.

 The QUEEN
 v.
 Inhabitants of
 BRIXHAM.

M. Smith, in support of the order of sessions. The omission to send the notice was no ground for quashing the order. [Lord *Denman* C. J. How then were the parish to take advantage of it?] It was a mere irregularity in the service, which does not affect the order itself, and the parish of Brixham has waived it by appearing at the sessions. Section 79 of 4 & 5 Will. 4, c. 76, enacts that no poor person shall be removed or removeable, unless notice of chargeability to the removing parish has been sent; and if the parish of Brixham had taken no step, the pauper could not have been removed to them; nor can he now be removed until notice has been sent. The object of section 79 was to obtain the decision upon the appeal before the pauper was actually removed, and that object has been attained in this case. The order which is sought to be quashed is perfectly good, and cannot be affected by the omission to do something subsequent, and which is only necessary for carrying it into effect. Before the new Poor Law Act, a pauper might be moved directly the order was made; now a further step is required, but the order is the same in both cases. The order is the judgment of the justices, and the appeal is against their judgment. Under the 35 Geo. 3, c. 101, which was an act for suspending the execution of orders of removal, in case of the pauper's sickness, some cases were decided which are in point here. In *Rex v. Englefield (a)*, an order of removal of a husband and his family was suspended, as to the husband, for a year, and on the husband's dying the family were removed without an order to take off the suspension of the original order, and the Court of King's Bench held that, as the order of removal

(a) 13 East, 317.

1838.

 The QUEEN
 v.
 Inhabitants of
 BRIXHAM.

was good upon the face of it, the sessions could not quash it, on the ground of the suspension of the original order not having been taken off. That was a stronger case, for there the pauper's family had been actually removed, but the Court held the original order could not be quashed for the subsequent irregularity. The same principle is recognized by the Court in *Rex v. Alnwick* (a). *Rex v. Penkridge* (b), on the other hand, is distinguishable. It is submitted that the parish might have consented to receive the pauper without any notice of chargeability having been sent to them, and if so, they might appeal, and so obtain the object of the notice; or they might have treated the service of the order as a nullity, and waited until it was properly served. [*Patteson J.* You contend that the parish of Brixham should have done nothing, but in that case the order would have stood, and would have been binding on them. The words of section 79 are, that the pauper shall not be removed or *removeable* until twenty-one days after a notice of his chargeability shall have been sent.] *Removeable* means *removeable under* the order, that is, not that the pauper is not the subject of an order, but that he shall not be *removeable* under it, when made, till after notice sent. Besides, the irregularity was waived by appearance at sessions. In *Fraas v. Paravicini* (c), where there was an irregularity in signing judgment, it was held that, as the defendant attended at the execution of the writ of inquiry, he had thereby waived the irregularity.

Elliott, contra, was not called upon by the Court.

Lord DENMAN C. J.—We are of opinion that the intention of the act was, that notice of chargeability should be sent in all cases where an order of removal is relied upon.

LITLEDALE, PATTESON and WILLIAMS Js. concurred.

Rule absolute to quash the Order of Sessions.

(a) 5 B. & Ald. 184. (b) 3 B. & Ad. 538. (c) 4 Taunt. 545.

The QUEEN v. WALL LYNN.

1838.

Wednesday,
May 30th.

UPON an appeal by the defendant against a rate for the relief of the poor of Sheffield, the West Riding Quarter Sessions confirmed the rate, subject to the opinion of the Court upon the following case:—This was an appeal against a rate and assessment, bearing date 1st of July, 1835, entitled an assessment made for the necessary relief of the poor, and for other purposes in the several acts of parliament mentioned, relating to the poor of the township of Sheffield, in the West Riding of the county of York, made and assessed this 1st day of July, A. D. 1835, being the first book at 2s. in the pound for the present year, wherein the appellant was rated as follows:—

Occupier.	Proprietor.	Description of Property.	Amount of Rate.
Wall Lynn,	George Rodgers.	House 22s. 6d. Garden 1s. 6d.	£1. 4s.

Catherine Eyre and *Hannah Rawson* are the proprietors of a brewery in the town of Sheffield, and the appellant *Wall Lynn* is their servant and head brewer. From the year 1828, down to the month of February, 1833, the appellant resided in a house situate in the brewery yard, under an agreement, bearing date the 1st of November, 1828, made between the said appellant and the said *Hannah Rawson*, and a copy of which agreement is annexed to this case. In the month of February, 1833, the health of the appellant being impaired, he removed from the house in the brewery yard to one with a garden attached to it, at Farm Bank, a quarter or half a mile from it, belonging to one *Edward Whitehead Drury*, who, upon the trial of the ap-

On an appeal against a poor rate it appeared that the appellant was the servant and head brewer of *R. & Co.*, and that by an agreement between them and him, they were to give him a certain salary and a house belonging to them, to occupy free of rent and taxes, and he was to take in another servant of *R. & Co.* if required. The appellant occupied the house for some time, and on leaving it, he took another house not belonging to them, which he occupied. *R. & Co.* were no parties to the taking of this house, but they paid the rent and rates. The appellant was assessed regularly in his own name for the window duty, and also for the poor's

rate: he had objected to being assessed to the poor's rate, but the two last rates previous to the one appealed against had been paid without objection. The appellant had also paid the registration shilling under the Reform Act, and had voted as the occupier with a 10*l.* qualification:—Held, that the appellant was properly rated, as his occupation was in no ways subordinate to his service, and the payment of rent by *R. & Co.* was an immaterial circumstance.

1838.

 The QUEEN
 v.
 WALL LYNN.

peal, stated that he made the agreement with the appellant, and saw no one else upon the matter, and that the rent was 35*l.* per annum, but that he considered *Rawson & Co.* as his tenants. Upon the sale of the said house and garden by *Drury* to one *George Rodgers*, the same tenancy was continued. When the appellant removed from the house in the brewery yard to the house at Farm Bank, the furniture which belonged to the proprietors of the brewery was then removed to the house at Farm Bank, and another servant of *Rawson & Co.* was then put by them into the occupation of that house in the brewery yard, which up to that time had been occupied by the appellant. The appellant's salary was at the same time increased; the rent and rates were paid by *Rawson & Co.* at the brewery. The assessment for window duty for the house at Farm Bank was regularly made in the name of the appellant, from the time of his entering upon the house down to the trial of this appeal, and paid at the brewery without any objection to the form of assessment. Appellant had also been assessed to the poor's rate in every rate since his entry upon the house and garden at Farm Bank, in respect of those premises. An objection was made to the last rate but two before that appealed against, on the ground that *Rawson & Co.*, and not the appellant, ought to have been rated, but the two last rates had been in the same name as before, and they had been paid without objection. In 1833, the appellant was summoned for the payment of the registration shilling, under the provisions of the Reform Act, which he paid, together with the costs of the summons. In the years 1832 and 1833, when the name of the said appellant was inserted in the list of voters for the election of members of parliament for the borough of Sheffield, as the occupier of the house at Farm Bank, the appellant objected to his name being inserted in the list. No formal objection however had been made according to the provisions of the Reform Act, and the name of the said appellant remained upon the register. In the year 1834, the name of the said appellant was again in-

serted in the list of borough voters ; a regular objection was made to his name being inserted there, which was disallowed by the revising barrister, after hearing evidence on the subject, and the appellant's name was retained. At the election for borough members in January, 1836, the appellant tendered his vote, and on being asked whether he voted for the house in Shrewsbury Road, Farm Bank, replied that he did, and voted accordingly. The appellant, at the time of the appeal, insisted, in conformity with his notice of appeal, that he lived in the house at Farm Bank as a servant only, and was not liable to be rated to the relief of the poor, but that the said *Catherine Eyre* and *Hannah Rawson* ought to have been rated for the same. Upon the hearing of the appeal, the said *Catherine Eyre* and *Hannah Rawson* appeared by their counsel, and contended that they were the parties liable to be rated, and that the said appellant occupied the said house and garden at Farm Bank as their servant only. The sessions decided that the said appellant was liable to be rated as the occupier of the said house and garden, subject to the opinion of this Court on all the facts of the case.

The agreement referred to in the case was made on the 1st of November, 1828, between *Wall Lynn* of the one part, and *Hannah Rawson* of the other, in which, after an undertaking by *Wall Lynn* to serve *Rawson* and her co-partner in the capacity of a clerk and brewer, the said *H. Rawson* promised to pay the said *Lynn* 150*l.* yearly, and to permit him to occupy and enjoy the house adjoining the buildings and brewery, as and for the place of his residence, free and clear of all rent, rates, and taxes ; *Thomas Bicks*, another clerk in the said brewery, being also provided with board and lodging in the said house if required by the said *H. Rawson*, the said *T. Bicks* also paying the expenses of his board ; which salary and house accommodation are to be in full satisfaction and compensation for all other perquisites of every description, and for any expenses incurred by him in the business.

1838.


The QUEEN
v.
WALL LYNN.

1838.

The QUEEN

v.

WALL LYNN.

Baines, in support of the order of sessions, was stopped by the Court.

Wortley, *contra*.—The question turns upon the agreement of 1828, and the Court is to decide whether it does not appear from that document that the occupation of *Lynn* was as a servant only. The principle on which these cases turn is this: if the residence of the party is not necessarily connected with and subordinate to the service, then the occupier is to be rated; if it is, then the owner of the house is to be rated; *Rex v. Cheshunt* (a), *Rex v. Kelstern* (b), *Rex v. Seacroft* (c), *Rex v. Minster* (d). *Lynn* clearly occupied as a servant, he paid neither rent nor taxes, and under the agreement he was bound to take another servant under his roof. [*Patteson*, J. Neither of those circumstances signifies. *Rawson* was not bound to pay the rent, and what *Lynn* agreed to do as to taking in a lodger in a former house, can have nothing to do with his agreement with another party touching another house.] In construing agreements of this kind, the rule laid down in *Rex v. Crediton* (e), (which has been found so useful with regard to contracts of apprenticeship,) should be applied, viz. that the primary intention of the parties should be looked at. If the sessions had examined the agreement with that rule before them, they must have found that the house was given to *Lynn* to enable him to devote himself more exclusively to the business. *Rex v. Field* (f) is an authority that, if the sessions have not applied the proper rule in cases of this kind, the Court will review their decision. *Rex v. Melkridge* (g) is probably relied upon by the other side, but it is distinguishable; for there the occupation was not connected with the service, and formed no part of the original contract. The appellant *Lynn* in this case has several times objected

(a) 1 B. & Ald. 473.

(b) 5 M. & S. 136.

(c) 2 M. & S. 472.

(d) 3 M. & S. 276.

(e) 2 B. & Ad. 493.

(f) 5 T. R. 587.

(g) 1 T. R. 598.

to being rated as occupier, and his employers have put in their claim. The consequences would be most injurious if employers of workmen could put their men into houses, and pay the rent for them in lieu of wages, and thereby create fictitious votes under the Reform Act, (2 *Will.* 4, c. 45, s. 27.)

1838.
The QUEEN
v.
WALL LYNN.

LORD DENMAN C. J.—I think, on the facts set forth, that this case is entirely free from doubt. The appellant rents and occupies a house, and is rated to all the burdens consequent on such occupation. None of the cases cited come into question, for in all of them the tenement occupied was the property of the master. It would hardly be contended that the payment of rent and taxes by a master for a house occupied by his servant makes the occupation auxiliary to the service. The cases cited where the occupation has been held to bear this character, are the cases of a butler occupying a pantry, a coachman the offices, and similar cases, between which and the present there is no analogy.

LITLEDALE J.—*Wall Lynn* was, without any doubt, in law the tenant of the person from whom he took the house. The house was also occupied by him as absolute owner, for his employers had no right whatever to put any one in, or any authority over his occupation. The mere payment of rent by them gave them no control over it, any more than any other gratuity to him which they might be pleased to allow.

PATTESON J.—Our decision in this case does not touch any of the other cases on the subject. The appellant here is the actual tenant of the house, and his employers had nothing whatever to do with it. By the agreement they were to give him a house near the brewery, but if he left it they were under no obligation to find him another house.

1838.

THE QUEEN
v.
WALL LYNN.

WILLIAMS J.—In *Rex v. Field (a)*, the matron of the Philanthropic Society had no distinct apartment in the house, except a bed-chamber; her services were required there at any moment, and she was dismissible on a month's notice.

Order of Sessions confirmed.

(a) 5 T. R. 587.

THE QUEEN v. The Rector, Churchwardens, and
Parishioners of ST. MARY, LAMBETH.

Monday,
May 28th.

1. If a poll be demanded at an election for churchwardens, under Sturges Bourne's Act (58 Geo. 3, c. 69), every rated inhabitant, whether previously present at the vestry or not, has a right to come in and vote, and the closing of the vestry doors during the poll, so as to exclude voters, is illegal.

2. But where the doors were so closed, during an election of churchwardens, and it did not distinctly appear that any rated inhabitant was excluded from voting, the Court refused

to grant a mandamus for a fresh election.

SIR J. CAMPBELL A. G., in Easter term last, had obtained a rule, calling upon the defendants to shew cause why a writ of mandamus should not issue, directed to them, commanding them to hold a vestry meeting, for the purpose of electing fit and proper persons to be churchwardens of the parish for the remainder of the year. The affidavits upon which this rule was obtained stated, that on the 17th April last, being the Tuesday in Easter week, a vestry meeting was held, pursuant to notice, to choose churchwardens, and for other purposes. The rector, according to custom, having nominated one churchwarden, the inhabitants in vestry assembled, entitled to vote under the 58 Geo. 3, c. 69, (*Sturges Bourne's Act*), proceeded to the election of three other churchwardens. *Henry Saunders, John Hunt, and John Barton*, having been proposed by one party, and *John Shepherd, David Sangster, and Charles Lovett*, by the other: upon a shew of hands the former had a majority, upon which a poll of the parish in the following terms, in behalf of the other candidates, was demanded by two rated inhabitants, "We demand a poll of the whole parish on behalf of *J. S. &c.*, proposed as churchwardens." A difference of opinion being expressed whether the legal mode of taking

the poll should be by the parishioners at large, or by the vestrymen then present; the chairman took the opinion of the vestry, on shew of hands, who decided that the poll should be taken of the inhabitants then present only. The poll was then taken, and the candidates first named had again the majority, and were declared duly elected. It was then sworn, that during the time of the poll being so taken, the doors were closed by order of the chairman. The affidavit of a rated inhabitant, named *Cawston*, stated that he was present at the vestry during the taking of the poll, and that he saw out of the window several inhabitants of the parish, and amongst others one *Wooton*, whom he knew personally, and who was a rated inhabitant, and that *Wooton* knocked repeatedly and loudly at the vestry door for admission, but without effect, and that he and the other inhabitants did not gain admission for half an hour, when the poll was over. The affidavit of a rated inhabitant, named *Pinkell*, stated that he was present at the vestry meeting at the commencement, and having left it for about three quarters of an hour, on his return found the doors shut, and after waiting twenty minutes, when he gained admission, he learned that a poll had been just taken.

Sir *W. W. Follett* and *Hayes*, now shewed cause. The demand of the poll of the whole parish instead of the vestry was not authorized by law, for the election of churchwardens ought to take place in vestry; *Prideaux*, Churchwardens, p. 70 (a); where it is laid down that, where a vestry is duly assembled, the voluntary absence of the inhabitants who do not attend, amounts to a devolution of power on those who do attend, and that every act of the major part of those present at such meetings is in law the act of the whole parish. Here the vestry was held on the accustomed day for elections, and it appears by the affidavits, that notice of the objects of the meeting was given, pursuant to the provisions of 58 *Geo.* 3, c. 69. The vestry being therefore duly

1838.

The QUEEN
v.
The Rector,
&c. of
ST. MARY,
LAMBETH.

1838.

The QUEEN
v.
The Rector,
&c. of
ST. MARY,
LAMBETH.

assembled, the chairman was right in proceeding to an immediate poll; and the opposite parties were wrong in claiming to put a stop to the proceedings of the vestry, by referring to the whole parish an election which by law ought to take place in vestry. The case of *Campbell v. Maund* (a), which will be relied on in support of the rule, is not an authority to shew that when a poll is demanded the right of election is taken from the vestry, but only decides that the right to demand a poll is incidental to all elections of parish officers, and that such poll may be demanded after a shew of hands; but the poll, when taken, is still the act of the vestry, and the taking of it is a continuance of the vestry. Before that case the law was, that only those present at the vestry at the time had the right of voting (b); and the law still is, that it is only the chairman who has the right to adjourn the vestry; *Rex v. Archdeacon of Chester* (c), *Rex v. St. Mary, Lambeth* (d). It will however be argued that the vestry should be kept open, so that every voter may have access to the poll; that the effect of closing the doors here was to confine the election to such as were present at the shew of hands, and thereby to render the demand of the poll nugatory. But assuming the closing of the doors to have been improper, this will not vitiate the election, unless it appear that a sufficient number of voters were excluded to affect the result of the election. So far from that being the case, it does not appear from the affidavits that any one voter was wrongfully excluded. Only two instances of rated inhabitants are brought forward, and of these only one makes an affidavit, by which it appears that he voluntarily absented himself, after the question arose in the vestry; and it does not appear that, when he returned and found the doors closed, he made any attempt to gain admittance, or that he intended to vote. With respect to the second instance, as the voter makes no affidavit himself, it does not appear whether he wished to vote, or even whether he had or had

(a) 5 A. & E. 865; S. C. 1 N. & P. 558.

(b) 4 Burn's E. L., Vestry, 9.

(c) 1 A. & E. 342; S. C. 3 N. & M. 413.

(d) 1 A. & E. 346, n.

not voted. And although the affidavits state that other inhabitants were standing outside the doors, it is not alleged that any of these were rated inhabitants, or entitled to vote. No injury is therefore shewn to have resulted from the closing of the doors, and the Court will not invalidate the election because a mistake was made in supposing that the doors ought to be closed, when there is nothing to shew that the proceedings of the vestry were in any manner affected by this mistake.

1838.

The QUEEN
v.
The Rector,
&c. of
ST. MARY,
LAMBETH.

Sir *J. Campbell* A. G., *contra*. The only question in dispute at the vestry was, whether the poll ought to be taken of those present only, or of all other rated inhabitants who might choose to come in and record their votes. The chairman took the sense of the vestry on shew of hands, who decided that the poll should be of those present only, and the doors were closed; and it distinctly appears by the affidavits, that other rated inhabitants could not get in during the poll, although they attempted to do so. No question, therefore, as to the power of the chairman to adjourn the vestry arises, but as the law enables the parishioners to demand a poll, by which parties not present may come in and record their votes, *Anthony v. Seger* (a), *Campbell v. Maund* (b), the point is, shall the parishioners present be allowed to defeat the law, by closing the doors, and preventing any one from voting but those actually present?

Lord DENMAN C. J.—I am of opinion that this rule must be discharged, for although there is no doubt whatever as to the law of the case, it really does not appear on the affidavits that any single elector was prevented from voting. If the effect of closing the doors had been to exclude any one who had a right to vote, and an intention of exercising that right, the case would have assumed a different aspect, but it does not at all appear that if the whole parish

(a) 1 Hagg. Con. Rep. 9.

(b) 5 A. & E. 865; 1 N. & P. 558.

1838.

The QUEEN

v.

The Rector,
&c. of
ST. MARY,
LAMBETH.

had been present, the result of the election would have been different.

LITLEDALE J.—The law on the subject is quite clear, that, if a poll is taken, all the rated inhabitants have a right to come in and record their votes, but it is impossible to say that any thing that has been done in this parish renders the result different from what it would have been, if no incorrect decision had been come to by the vestry.

PATTESON and WILLIAMS Js. concurred.

Rule discharged.

Wednesday,
May 30th.

The QUEEN v. STOCK and another.

1. Under the 59 Geo. 3, c. 134, s. 39, the commissioners for building new churches have the power of stopping up unnecessary paths in church-yards, on giving notice in the manner and form prescribed by the 55 Geo. 3, c. 68. The notice prescribed by that act states, that the order will

UPON an appeal to the Warwickshire Epiphany quarter sessions, 1837, against an order, under the common seal of his late majesty's commissioners for building new churches, whereby the said commissioners, with the consent of two justices of the county of Warwick, ordered that certain footpaths in the church-yard of St. Philip, Birmingham, should be stopped up and discontinued; the quarter sessions quashed the order, subject to the opinion of this Court upon a case which stated the following facts:

The respondents were made a corporation by the third section of the statute 59 Geo. 3, c. 134, which was an act to amend and render more effectual an act passed in the previous session, for building and promoting the building of additional churches in populous parishes; which act, be lodged at the next quarter sessions, and will then be confirmed and inrolled, unless upon an appeal against the same, to be then made, it be otherwise determined. The 59 Geo. 3, c. 134, contained no other enactment relating to an appeal:—Held that, although it appeared to be the intention of the legislature to give an appeal against the order of the commissioners, they had not carried that intention into effect.

2. Where an act of parliament directs a mode of procedure to be adopted, as contained in a former act, the repeal of such act does not operate to repeal the procedure directed, which is to be considered as incorporated in the latter act.

as well as the recited act, is to be considered part of this case. The 39th section of that act is in the following terms: "And be it further enacted, that it shall be lawful for the said commissioners, if they should think fit, to alter, repair, pull down and rebuild, or order or direct to be altered, repaired, pulled down and rebuilt, the walls or fences of any existing church-yard or burial ground of any parish or chapelry, and to fence off, with walls or otherwise, any additional or new burial ground to be set out or provided by virtue of this act; and also to stop up and discontinue, or alter or vary, or order to be stopped up and discontinued, or altered or varied, any entrance or gate leading into any church-yard or burial ground, and the paths, footpaths and passages into, through or over the same, as to them may appear useless or unnecessary, or as they should think fit to alter or vary, provided that the same be done with the consent of any two justices of the peace of the county, city, town or place, where any such entrance, gate, path or passage shall be stopped up or altered; and on notice being given, in the manner and form prescribed by an act passed in the fifty-fifth year of the reign of his present Majesty, intituled, 'An Act to amend an Act of the Thirteenth Year of his present Majesty, for the Amendment and Preservation of the Public Highways, in so far as the same relates to the Notice of Appeal against turning and diverting a Public Highway, and to extend the Provisions of the same Act to the stopping up of unnecessary Roads'." The act of parliament referred to in that section, as passed in the fifty-fifth year of the reign of his late Majesty, viz. the 55 *Geo.* 3, c. 68, was repealed by the stat. 5 & 6 *Will.* 4, c. 50, s. 1, which received the royal assent on the 31st August, 1835. At the sessions the respondents produced an order, made by his majesty's commissioners for building churches, under their corporate seal, with the consent of two magistrates for the county of Warwick, residing in the town of Birmingham, bearing date

1838.

The QUEEN
v.
STOCK
and another.

1838.
 The QUEEN
 v.
 STOCK
 and another.

the 2d day of March, 1837. The following is the order referred to, and was returned to this Court upon the certiorari.

"We, his majesty's commissioners for building new churches, do hereby, with the consent of *J. F. L.* and *F. L.*, Esqrs., two of his majesty's justices &c. for the county of Warwick, order that the under-mentioned paths, footpaths and passages, &c., should be stopped up and discontinued; that is to say, &c., and which said several paths &c., appear to us useless and unnecessary. Dated 2d day of March, 1837."

The consent (a) of the justices, referred to in the above order, was as follows:

"Warwickshire, to wit. We, *J. F. L.* and *F. L.*, Esqrs., two of his majesty's justices for the county of Warwick, at a special sessions, held at &c., on &c., having upon view found that certain paths &c. (describing them by metes and bounds), are useless and unnecessary, do hereby consent to the said several paths &c. being discontinued and stopped up, pursuant to the powers contained in an act, intituled, &c. Given under our hands and seals, the 20th January, 1837."

The appellants were gentlemen residing in or near the parish of St. Philip, Birmingham, and were aggrieved by the order of the commissioners. They gave notice of appeal in the usual form. This notice was served, more than ten days before the quarter sessions, upon the respondents, the consenting magistrates, and the surveyors of the highways of the parish of Birmingham, of which St. Philip's parish, for this purpose, forms part, and affixed to the door of the church of St. Philip, and of the parish church of St. Martin, Birmingham. At the quarter sessions the appellants entered their appeal with the clerk of the peace, and their counsel claimed to be heard in support of it. This was objected to by the counsel for the commissioners, on the ground that there was not, in point of law, any appeal to the quarter sessions from an order made by his majesty's commissioners for building new churches, under the 59 *Geo. 3*, c. 134, s. 39. The Court of Quarter Sessions decided that there was such right of appeal, and accordingly entertained the said appeal. On the part of

(a) This order was also returned with the case upon the certiorari.

the commissioners, the publication of certain notices (which were in the following form) was then proved:

" Notice is hereby given, that on the 2d day of March, in the year 1837, an order was made by his majesty's commissioners for building new churches, by and with the consent of *Joseph Frederick Ledsam*, Esq. and *Francis Lloyd*, Esq., two of his majesty's justices of the peace for the county of Warwick, for stopping up and discontinuing the under-mentioned paths, footways and passages, within the church-yard belonging to the parish church of St. Philip, in Birmingham, in the county of Warwick, that is to say, (here followed a description of the path, in the same words as above stated, but without reference to the plan). And that the said order will be lodged with the clerk of the peace for the said county of Warwick, at the general quarter sessions of the peace, to be holden at Warwick, in and for the said county of Warwick, on the 4th day of April next. And also that the said order will, at the said quarter sessions, be confirmed and inrolled, unless upon an appeal against the same, to be then made, it be otherwise determined. Dated this 4th day of March, in the year 1837.

" *H. M. Griffiths*, Solicitor, Birmingham."

But, as it appeared that two orders had been made by the commissioners, and that the notices did not refer to the order then produced, the Court quashed the order. If the Court of Queen's Bench shall be of opinion that the sessions had jurisdiction to entertain the said appeal, then the order of sessions is to be confirmed; if not, it is to be quashed.

Sir *J. Campbell A. G.*, *Balguy* and *Mellor*, in support of the order of sessions. The two questions raised in this case are, whether an appeal is given by the 59 *Geo. 3*, c. 134, s. 39, to the sessions, against an order of commissioners for stopping up a church path, and if so, whether such appeal is taken away by the 5 & 6 *Will. 4*, c. 50.


I. By the 59 *Geo. 3*, c. 134, s. 39, the commissioners for building new churches have the power to stop up such church paths as may appear to them unnecessary, subject to a "notice being given in the manner and form prescribed by 55 *Geo. 3*, c. 68." That act, which was passed to regulate the practice of appeals under the old Highway Act (13 *Geo. 3*, c. 78), contains in its schedule the form of notice which is directed to be adopted, when an appeal to ses-

1838.

The QUEEN
v.
STOCK
and another.

First point:
An appeal is
given against
the commis-
sioners' order
for stopping up
a church path,
by 59 *Geo. 3*,
c. 134, s. 39.

1838.


 The QUEEN
v.

 STOCK
and another.

sions is to be made. The commissioners acting under the 59 *Geo. 3*, c. 134, have adopted that form of notice, inviting the attention of all parties interested in the order made by them, and giving them an opportunity of appealing, and now it is contended that there is no appeal against their order. But what can be the meaning of the notice directed to be given by the 59 *Geo. 3*, c. 134, unless it be to give any party grieved the right of appeal? for it will be observed the notice is given after the order is made, when the justices are *functi officio*. It was intended, no doubt, to subject the orders of commissioners, stopping up a path, under the 59 *Geo. 3*, c. 134, to the same control that orders of justices, for a like purpose, are subjected to under 55 *Geo. 3*, c. 68, and for that purpose the like notice pointing out an appeal is directed to be given. No particular form of words is required for creating a jurisdiction, if the intention of the legislature be apparent. Thus, in *Rex v. St. James, Westminster (a)*, where a local act provided that if any person found himself aggrieved by any rate, he should first apply to two justices, and if not relieved, he should be obliged to pay such rate, and then might appeal to the next quarter sessions, although the act gave the justices no power to administer an oath, and contained no direction as to the mode of hearing the complaint, it was held that by necessary implication the two justices had power to hear the complaint, and relieve the party. *Patteson J.* there said, "I cannot conceive that the legislature should do so absurd a thing as to direct an application to justices, and then oblige the justices to say to the person applying, 'we have no power to relieve you, therefore you must go to the sessions'." So in this case, as the statute has directed a notice to be used, pointing out an appeal, it must have intended that there should be an appeal. It is true that the notice is contained in the schedule to the act, but the schedule must be considered equally with the body of the

(a) 2 A. & E. 241; 3 C. 4 N. & M. 252.

act; *Rex v. Milverton* (a). The Court also will construe liberally any clause which gives to the subject a right of appeal. Many cases to this effect were cited in *Regina v. Watts* (b); and *Rex v. The Recorder of Poole* (c) is another strong authority on this point. There the question arose as to the right to appeal against a borough rate, and it was contended that, as the appeal against borough rates was to be of the same nature as an appeal against a county rate, which, under 55 Geo. 3, c. 51, and 57 Geo. 3, c. 94, can only be appealed against by parish officers, so a borough rate could be appealed against by parish officers only. But the objection could not be maintained.

II. The next point is, whether, as the 59 Geo. 3, c. 134, s. 39, adopts the notice contained in 55 Geo. 3, c. 68, and as that latter statute is repealed by 5 & 6 Will. 4, c. 50, s. 1, the provision of the 59 Geo. 3, c. 134, is not repealed also. [Lord Denman C. J. That point clearly cannot be maintained.]

Waddington, contra. It is not correct to state that a liberal construction is always given to statutes creating an appellate jurisdiction. On the contrary, the rule of law is, that express words are necessary to create an appeal. This appears expressly by *Rex v. Hanson* (d). Lord Tenterden C. J. there said, "The rule of law is, that although a certiorari lies, unless expressly taken away, yet an appeal does not lie unless expressly given by the statute." It is impossible to say that an appeal is expressly given by 59 Geo. 3, c. 134, s. 39. Nor is it given by implication, for against no one act of the commissioners under that act or the former act, 58 Geo. 3, c. 45, by which they were established, is any appeal given. Some of these acts are of much more importance than stopping up a path; why should an appeal be given against the latter only? The difficulty in this case arises from the commissioners having adopted the notice

1838.
The QUEEN
v.
STOCK
and another.

Second point:
The repeal of
an act of par-
liament does
not repeal
such of its
provisions as
are adopted
by reference
in a subse-
quent act.

First point.

(a) 5 A. & E. 841; S. C. 1 N. & P. 179.

(b) 2 N. & P. 367.

(c) 1 N. & P. 756.

(d) 4 B. & Ald. 519.

1838.

 The QUEEN
 v.
 STOCK
 and another.

given in the 55 *Geo. 3*, c. 68, *in toto*. They ought, under the 59 *Geo. 3*, c. 134, to give a notice generally, and they have added a reference to an appeal, but that is mere surplusage, and cannot give parties the power of appealing, unless the statute confers it. If an appeal is given, then the forms pointed out in 55 *Geo. 3*, c. 68, must be complied with, viz. a notice to the surveyor of the highways, &c., which is absurd. [Sir *J. Campbell* A.G. In *Regina v. The Recorder of Carmarthen* (a), the same argument was attempted, but unsuccessfully; the provisions must be applied *mutatis mutandis*.] That case proceeded on the particular words of the 5 & 6 *Will. 4*, c. 76. [*Patteson* J. Do you consider the consent of the justices a mere ministerial act? for if not, it is an order of two justices, against which there may be an appeal.] It does not amount to an order; the consent for stopping up the path is not signed or sealed by the justices. There is no order, therefore, of the justices to appeal against. It is admitted that the order of the commissioners would not be valid without the consent of two justices, but that shews that there is no necessity for an appeal, as the justices have a *veto*.

Lord DENMAN C. J.—The second objection does not appear to be relied upon, and is not in fact at all tenable. The only question therefore is, whether an appeal is given by the 59 *Geo. 3*, c. 134, s. 39. I should conjecture, on looking into the act, coupled with the 55 *Geo. 3*, c. 68, that it was intended to be given, but I cannot say that that intention has been carried into effect. The rule of law stated by Lord *Tenterden*, requires that an appeal should be expressly given by statute. It is only by implication that such a privilege can be held to have been given here. The notice directed to be used certainly intimates that the order will, at the next sessions, “be confirmed and inrolled, unless on an appeal against the same, to be then made, it be otherwise determined,” which looks like holding out a

challenge to all interested to appeal if they choose. *The Queen v. The Recorder of Carmarthen* (a) throws no light upon the case, and on the whole I think that though the intention of the legislature may have been to give an appeal, they have not carried it into effect. The necessity for being rigid on clauses supposed to give an appeal is obvious, viz. that, as a new jurisdiction is created, it is necessary to see to what parties and to what subject-matter it is intended to be confined.

1838.

 The QUEEN
 v.
 Stock
 and another.

LITTLEDALE J.—The notice of appeal in the schedule to the 55 Geo. 3, must be considered as incorporated in the 59 Geo. 3, c. 134, but still I do not think that the right to appeal can be given by implication. The rule laid down by Lord *Tenterden* seems to be good law. If then no power of appeal is given expressly by the 59 Geo. 3, c. 134, as it certainly is not, all that reference to an appeal which is contained in the notice is mere surplusage.

PATTERSON J.—The clause in question has certainly stopped short of granting an express power of appeal. Then as the rule laid down by Lord *Tenterden* seems to be good law, it follows that whatever the legislature meant, they have not expressed their intention, and we cannot supply the omission.

WILLIAMS J.—I am of the same opinion; and I am very much influenced by the fact, that in all the statutes giving an appeal, as far as I recollect, there is an express appeal clause, and I do not recollect any instance of an appeal having been allowed by implication.

Rule absolute.

Order of Sessions quashed.

(a) 3 Nev. & Per. 19.



1838.

Wednesday,
May 30th.

The QUEEN v. RUSCOE.

1. The legal meaning of the word "stage-waggon" is a conveyance that carries goods or passengers, for hire, from one fixed point to another.

2. Thus, where a local turnpike act imposed a certain toll on every horse, &c. drawing a carriage of any description, but contained an exception for every person who had paid toll on any carriage, &c. once on the day; and the act contained a further proviso that every stage coach, diligence, van, caravan, or stage waggon, or other stage carriage, conveying passengers or goods for pay or reward, should pay toll every time of passing and re-passing,—it was held that the waggons of a wharfinger, carrying out the goods, brought by a canal, to the different consignees, and collecting the goods from persons in the neighbourhood, to carry to his wharf, were not "stage waggons" within the meaning of the act.

ON an appeal against a conviction for exacting too much toll, under a local act, 4 Geo. 4, intituled "An Act for improving and maintaining in repair divers roads in the county of Stafford, leading from Newcastle-under-Lyme to Blyth Marsh, from Cliff Bank to Snape Marsh, from Lower Lane to Hern Heath, and from Shelton to Newcastle-under-Lyme," the Staffordshire Quarter Sessions quashed the said conviction, subject to the opinion of this Court on the following case:

The appellant, *Thomas Pearson*, the toll collector at a turnpike gate called Fenton Gate, in the parish of Stoke-upon-Trent, demanded and received from *Ralph Ruscoe*, for the toll on horses drawing two waggons belonging to him, returning about twelve o'clock at noon on the 29th day of March last, the sum of 4½d. for each waggon, the said two waggons having with the same two horses passed the said turnpike gate about eight o'clock on the morning of the same day, and for which the like toll had been demanded and paid to the said *Thomas Pearson*. *Ralph Ruscoe* claimed to be exempt by reason of such previous payment. He is a wharfinger at Stoke-upon-Trent, and is agent to *Henshall* and Co., carriers upon the Trent and Mersey Canal, and employs his waggons and horses in carrying out goods brought by the canal carriers, from his wharf on the canal, for persons in the neighbourhood, and in collecting crates and other goods from the neighbourhood, to his wharf, for transit by the canal. *Ralph Ruscoe* is paid for each and every package of goods which he so carries, and his waggons were so loaded each time on the said 29th day of March last; and his waggons are so employed almost every day, except Sundays, in carrying goods to

1838.

The QUEEN
v.

RUSCOE.

persons residing at or near Lane End, or places intermediate between it and Stoke, and in carrying goods from such persons to the said wharf. His journies are made at different hours, according to circumstances; but he generally commences before eight o'clock. On some days his journies are more in number than on others, and there seldom occur days when he omits journies altogether. The times of his return vary, being regulated by the facility or otherwise in collecting loads. Mr. *Ruscoe* has no office or receiving house at Lane End. The 4 *Geo.* 4, above mentioned, amongst other provisions, enacts that "if any person should, upon any day, have paid the toll thereby authorized to be taken for the passing of any horse, cattle, beast, or carriage, through any one of the toll gates or turnpikes hereinbefore authorized to be continued or erected upon any part of the said roads, such horse, cattle, beast, or carriage, should, upon a ticket denoting the payment thereof on that day being produced, be permitted to pass toll free through the same toll gate or turnpike, and also through all the other toll gates and turnpikes erected or to be erected upon the whole line of the said roads, at any time or times during the same day, to be computed from twelve of the clock at night to twelve of the clock in the next succeeding night;" and it was also further enacted that the tolls thereby made payable should be paid for and in respect of all horses or beasts of draught drawing any *stage* coach, diligence, van, caravan, or *stage waggon*, or other *stage carriage*, conveying passengers or goods for pay or reward, every time of passing or repassing along the said roads or either of them.

If the Court should be of opinion, from the facts stated in the case, that the above-mentioned waggons of the appellant come under the denomination of *stage waggons* or other *stage carriages*, then the aforesaid order of sessions shall stand confirmed; but if the Court shall be of a contrary opinion, then the aforesaid order shall be quashed.

1838.

 The QUEEN
 v.
 RUSCOR.

By the chairman's direction it was added to the case, that the distance between Stoke and Lane End is two miles.

The local turnpike act bears date the 23rd May, 1825. It enacts that certain tolls may be demanded and taken (and inter alia) "for every horse or other beast, drawing any carriage of any description, the sum of three pence"—(now raised to 4½d., being an additional half toll, in consequence of the commissioners of the road having borrowed money from government.)

Talfourd Serjt. (with whom was *Whitmore*) in support of the order of sessions. It is contended that the waggon of the defendant is not a stage waggon, and therefore that it should be exempted from toll. But there is no definite legal meaning of the word *stage*, so as to exclude from it the waggons in question. In common parlance all light carts are called stage carts, although they do not ply for passengers or goods. It is this use of the word which the legislature has adopted in the present local act. This is confirmed by the 50 *Geo. 3*, c. 104, s. 6, where the legislature has used the word *stage* with the same meaning; for it enacts that every cart having the name and place of residence of the owner, and the words "common stage cart," legibly painted thereon, which shall be kept truly and without fraud to be used wholly in the affairs of husbandry, or in the carriage of goods in the course of trade, shall be exempted from the duties granted by that act. Under some of the stamp acts, again, as the 2 & 3 *Will. 4*, c. 120, s. 5, and 6 & 7 *Will. 4*, c. 64, s. 7, the word *stage* is used with reference to the speed with which a carriage travels on the roads. These acts shew that the word varies in its meaning according to the subject-matter, and that where no definition of it is given in the act, it is used according to the understanding of the term in common use. If the clause in the local act had contained the word "stage" only at the commencement of the clause, it then might have been held to apply in its more limited sense only to the different sub-

ject-matter following; but as it is inserted again before "waggon," it is a further proof of its being used as a popular term.

1839.

The QUEEN
v.
RUSCOE.

V. Lee, *contra*. The waggon in question does not come within the meaning, either popular or legal, of a stage. *Dr. Johnson* defines "stage coach" as "a coach that keeps its stages; a coach that passes and repasses on certain days for the accommodation of passengers." The 2 & 3 Will. 4, c. 120, s. 5, enacts that every carriage used for the conveyance of passengers for hire to or from any place, travelling along a highway at the rate of three miles an hour, shall be deemed to be a stage carriage; provided the passengers shall be charged and pay a separate fare. The clause in the local act is drawn exactly in the same spirit, relating to every stage coach, stage waggon, or other stage carriage, conveying passengers or goods for hire or reward. The legal, therefore, as well as the popular meaning of the word "stage" evidently requires that there should be certain fixed points and times of departure, certain stages, in fact, by which the carriage can be characterised. The use these waggons are put to, shews that they cannot be brought within this class. Again, if the waggon should be held to be a "stage," the defendant is a common carrier, and is liable to indictment for refusing to carry goods: but how could such an indictment be framed?—to what point could he be required to convey goods? An opinion of a most eminent counsel, then at the bar, was given soon after the passing of the local act, that waggons like the defendant's were not subject to the toll (*a*). *Gildart v. Glad-*

(*a*) The following opinion of the late Mr. Justice *Taunton* on the local act in question was cited at the bar. The case related to the liability of Messrs. *Pickford's* waggons, which were used under circumstances similar to the de-

fendant's. "The exemption under the local act in question is in the first instance general, being in favour of every horse, cattle, beast, or carriage, passing through the toll gates with a ticket, denoting the payment on that day of the

1888.

 The QUEEN
 v.
 RUSCOE.

stone (a), and many other cases (*b*), shew that where the words of an act of parliament are ambiguous, the public are not to be charged.

Lord DENMAN C. J.—I should apprehend that it was intended not to exempt waggons of the description in question, but as the legislature have qualified the enumeration of vehicles by the application of “stage” to some of them, we are bound to find some meaning for the term. I think the only legal meaning we can give to the word is, that of a conveyance running certain stages, from one fixed point to another. An errand cart probably, going to a public house for parcels, and returning at regular hours, may be

toll. The exception which follows is secondary or subordinate to the exemption; and it is clear that if the carts of Messrs. *Pickford* do not come within the terms of the exception, they are entitled to the benefit of the clause of exemption. And I am of opinion, on the whole, after referring to the acts cited above, and to the various cases on the post-horse duty, in which travelling by the stage has sometimes been discussed, but which contain no decision on this point, and more particularly on considering the popular sense of the term ‘stage carriage,’ which is defined by Dr. *Johnson* to be one that ‘keeps its stages,’ that the carts of Messrs. *Pickford* are not excepted from the exemption. The words of the exception are, ‘stage coach, diligence, van, caravan, or stage waggon, or other stage carriage, conveying passengers or goods for pay or reward.’ These words appear to me to import public carriages, which travel certain stages, or at least one certain stage. But Messrs. *Pickford*’s

carts do not go backwards and forwards to any certain place, but their rounds are altogether irregular, depending on the places of abode where the consignees of the goods, brought by the canal to the wharf, reside. It is true Messrs. *Pickford* charge the consignees with something extra for the cartage; but the exception requires not merely that the carriage should convey passengers or goods for pay or reward, but that it should be a stage carriage. On the ground therefore that the carts are not stage carriages, I think that they do not come within the description to which the exception applies; and, consequently, that they are exempt from a second payment of a toll on the same day on which they have already paid, on producing a ticket denoting the payment.”

(a) 11 East, 685.

(b) See *Casher v. Holmes*, 2 B. & Ad. 592; *Stourbridge Canal Company v. Wheelley*, 2 B. & Ad. 792.

the lowest species of stage; but nothing less than that will satisfy the term.

1838.

The QUEEN
v.
RUSCOE.

LITLEDALE J.—The definition given by *Johnson* of “a stage” seems accurate enough, and I do not think a better can be framed.

PATTESON J.—I confess I do not know what the legislature meant by the term “stage” in this act. I think they probably meant to collect toll from every conveyance passing along the road with different horses and with a different load, carried for hire. But we are bound to put a meaning on the terms they have used; and I agree with the Court, that something fixed in the time of departure, and a locus ad quem, appear to be essential to the legal meaning of “a stage.”

WILLIAMS J.—If I were to speculate on what was the meaning of the act of parliament, I should say it intended to include every conveyance making a journey out and home for pay or reward. This is in fact done by the defendant’s waggons; but as the act imposes a pecuniary liability on the public, the construction of it must be rigid.

Order of Sessions quashed.
Conviction confirmed.

1838.

Thursday,
May 31st.

THE QUEEN v. THE JUSTICES OF WORCESTERSHIRE.

The parish of St. Andrew, Pershore, contains six districts, five of them having always been, as far back as can be traced, distinct chapelries, and separately maintaining their poor, and entirely unconnected, both with each other and the rest of the parish, for all parochial purposes. The sixth district is divided into St. Andrew Pershore and Pensham, containing together about 1300 acres, and a population of about 1000, the river Avon running between them. Pensham has a constable, and collects its own church, highway, county, and constable rates.

It has no church, but its inhabitants attend the mother church of St. Andrew, Pershore, in common with the inhabitants of the latter place. St. Andrew has two overseers, and supplies the vicar's churchwarden; the other churchwarden is elected by the rate-payers of both districts out of the inhabitants of Pensham. Pensham has also one overseer. The poor rates for the two districts are separately made and collected, but when collected constitute a common fund, which is applied indiscriminately to the relief of their common poor, who are also maintained together at their common workhouse in the St. Andrew district.

Held, that Pensham was not a separate district for the maintenance of the poor, that it was not necessary to treat it as such, in order to give it the benefit of the 43 *Eliz.* c. 2, and that, therefore, an appointment of two separate overseers for it was bad.

A RULE nisi had been obtained for a certiorari to bring up an order of two justices of the county of Worcester, bearing date the 6th of April, 1837, whereby two overseers of the poor were appointed for the hamlet of Pensham, in the said county, in order that the same might be quashed.

The affidavits in support of the rule stated, that the parish church of St. Andrew, in Pershore, is the mother church of that parish, and that the parish included within its ambit five places, Wick, Bricklehampton, Pinvin, Besford, and Defford, which, as far back as could be traced, were believed to have been chapelries in the parish, but had commonly been reputed and treated as distinct parishes, each having its own chapel, maintaining its own poor separately, and altogether unconnected for parish purposes with any other part of the parish. The parish also includes a portion of the market town of Pershore, which is called St. Andrew's Pershore, and the hamlet of Pensham, commonly called the Pensham part of the parish of St. Andrew, which two places are separated from each other by the river Avon, but had been, as long as could be remembered, and immemorially before, according to traditional accounts, treated and reputed as one parish for the relief of the poor. The St. Andrew portion of the parish contains about 610 acres, and in 1831 had a population of about 964 persons; the hamlet of Pensham contains about 704 acres,

and a population of about 118 persons. There is no chapel at Pensham, and its inhabitants have always attended the parish church of St. Andrew, the pews of which are occupied indiscriminately by the inhabitants of either place. Two overseers have always been appointed for St. Andrew Pershore, and one only for Pensham, until six or seven years back, since which time two have been appointed for each place. Two churchwardens have always been appointed for the parish of St. Andrew (including Pensham), one of whom is chosen by the vicar, and is commonly called the Vicar's Churchwarden, and the other is chosen in vestry by the rate-payers of both districts, but out of the inhabitants of Pensham. No workhouse is known to have existed in the Pensham part of the parish; its poor have always been placed in the workhouse of St. Andrew indiscriminately with the poor of the latter place. The poor rates have always been made and collected separately, but, when collected, have been blended together in one account, and the expense of maintaining the poor has always been borne in the proportion of two-thirds by St. Andrew, and of one-third by Pensham, such proportion being supposed to coincide with the comparative value of their property respectively. The affidavits in opposition to the rule stated, that Pensham had its own collectors of the poor, church, highway, county, and constable rates, and its own constable. Orders of removal had been made from Pensham, one order of removal to it, but it did not appear whether it had been acted upon. An order of justices had been made in 1828, upon the putative father of a bastard child, for a sum of money to be paid "to the churchwardens and overseers of the hamlet of Pensham." Separate jury lists and lists of county voters had been made out of the hamlet, and a separate guardian of the poor chosen for it, in the formation of the Pershore Union, under the Poor Law Amendment Act.

1838.

 The QUEEN
 v.
 Justices of
 WORCESTER-
 SHIRE.

Sir J. Campbell A. G. and V. Lee, now shewed cause.

1838.
 The QUEEN
 v.
 Justices of
 WORCESTER-
 SHIRE.

—If the appointment of two overseers for Pensham is bad, there may be an appeal against it to the sessions; the Court therefore will not interfere by certiorari. [Lord Denman C. J. We have no doubt about the propriety of issuing a certiorari, if the appointment is bad; *Rex v. Standard Hill*(a).] The whole parish of St. Andrew is divided into several townships, five of which have their own separate overseers; therefore such a parish cannot, according to *Rex v. Sir Watts Horton*(b), have the benefit of the 43 *Eliz.* unless the remaining townships also are allowed to appoint separate overseers. Pensham is a township (c); it has its own overseer and constable, and collects its own rates. *Rex v. The Justices of Salop*(d) and *Rex v. Leigh*(e) are also authorities, in confirmation of the case last cited, that a place circumstanced like Pensham is entitled to have separate overseers, according to the provisions of 13 & 14 *Car. 2*, c. 12, s. 21.

Sir W. W. Follett, W. J. Alexander, and Whitmore, contrà.—The authority of *Rex v. Sir Watts Horton* (b) does not apply to the circumstances of this case. In that case the parish could not reap the benefit of the 43 *Eliz.* on account of its extent and population; it had five overseers, which circumstance of itself has always been considered to afford an indication that a parish cannot have the benefit of the statute, and all the townships were situated alike, each having an overseer of its own. Here there are five distinct chapelries, which have also maintained their own poor separately, probably because they were distinct ecclesiastical divisions at the passing of the statute of *Elizabeth*; and they appear to have had separate overseers on that account, as in *Hilton v. Pawle* (f) and *Nichols v. Walker* (g),

(a) 4 M. & S. 378.

(b) 1 T. R. 374.

(c) Wherever there is a constable, there there is a township, per Buller J. in *Rex v. Sir Watts*

Horton, 1 T. R. 374.

(d) 3 B. & Ad. 910.

(e) 3 T. R. 746.

(f) Cro. Car. 92.

(g) Ibid. 394.

and not by virtue of the 13 & 14 *Car.* 2; and the question is, independently of those chapelries, whether, as between St. Andrew Pershore and Pensham, which may together be taken as a parish, and the latter of which is not a distinct ecclesiastical district, there is any reason for their separation. A parish cannot legally be divided for the maintenance of the poor, unless it cannot otherwise have the benefit of the act of *Elizabeth*; *Bastock v. Ridgway* (a), *Rex v. Newell* (b), *Rex v. Uttoxeter* (c), *Peart v. Westgarth* (d). In *Rex v. The Justices of Salop* (e), the parish divided was of great extent, and part of it lay in one county and part in another. There is no difficulty in this case on account of any actual separation, for although the poor rate has been separately raised, it has always been jointly administered; and even if the poor of the two districts were separately maintained under the 13 & 14 *Car.* 2, c. 12, s. 21, they may recur to the general provision of 43 *Eliz.* c. 2, and again maintain their poor as one entire parish; *Rex v. Palmer and another* (f).

Lord DENMAN C. J.—Upon the facts disclosed by the affidavits on both sides, I think that there is no sufficient reason why Pensham should have separate overseers. There are five distinct portions of the parish having no connection with the residue, which has two names for separate districts, St. Andrew Pershore and Pensham. Pensham appears for a length of time to have had one overseer, and to have collected its own proportion of the poor rate, but the whole rate, for both districts, goes into one common fund, and has always been applied for the maintenance of the poor of either district indiscriminately. That is not evidence that these districts constitute townships acting independently of each other, but rather that some agreement has been entered into between them for their mutual con-

(a) 6 B. & C. 496; S. C. 9 D. & R. 585.

(b) 4 T. R. 266.

(c) 1 Doug. 346.

(d) 3 Bur. 1610.

(e) 3 B. & Ad. 910.

(f) 8 East, 416.

1838.
 The QUEEN
 v.
 Justices of
 WORCESTER-
 SHIRE.

venience. The extent of these districts and of their population certainly affords no ground for saying, that, unless disunited, they cannot have the benefit of the statute of *Elizabeth*. The argument derived from the authority of *Rex v. Sir Watts Horton* (a) is answered by the cases from *Cro. Car*: the five chapelries were probably acting as distinct parishes when the statute of *Elizabeth* passed, and the remainder of the parish, therefore, may be considered as a parish by itself; and in this point of view there is no pretence for saying that it ought to be divided.

LITLEDALE J.—The five chapelries are not in common parlance part of the parish, though they may be so for some purposes, and were probably separated from it long before the statute of *Charles 2*, passed. The remainder is to be considered as one entire parish, of about 1300 acres, with a population of about 1000. Surely such a parish, without division, can well maintain its poor. It seems the river runs between its two parts, which may account for the arrangement about a separate collection of the rate. The rate, however, when collected, forms a joint fund. If Pensham were already separated from the other part of the parish, it might not be necessary to reunite it; but I do not think that it ever, in point of fact, has been separated.

PATTESON J. concurred.

WILLIAMS J.—The circumstance of Pensham separately repairing its roads is by no means decisive. Parishes in the North of England are often divided for the purpose of repairing their respective roads. The joint application of a common fund, composed of rates payable by the two districts, does any thing but indicate their acting as separate parishes.

Rule absolute,

(a) 1 T. R. 374.

1838.

The QUEEN v. The MANCHESTER and LEEDS Railway Company.

Thursday,
May 31st.

SIR F. POLLOCK, in Easter term last, obtained a rule nisi for a certiorari, to bring up an inquisition taken in February last, for the purpose of assessing the sum of money to be paid to *Henry Taylor*, and certain other persons therein named, for the purchase of certain lands, taken by the Company under the act of parliament passed for making a railway from Manchester to Leeds. Various objections were made to the inquisition. The affidavit of Mr. *Taylor* (on which, among others, the rule was obtained), after reciting that the act gave the Company power to take lands mentioned in a schedule to the act, and also any other lands, not in the schedule, if they had been omitted by mistake, and that the Company, notwithstanding his protest, issued their warrant to the sheriff of Lancaster, to hold an inquisition for the purpose of assessing compensation to the deponent for certain lands of his, which were required by the Company, proceeded as follows: "That notwithstanding the said protest to the Company and to the said sheriff, the jury, so summoned as aforesaid, was impanelled and sworn, and the inquisition was taken, and that such jury did find, assess, and give their verdict for the sum of 17,000*l.*, to be paid by the said Manchester and Leeds Railway Company, for the purchase of the premises hereinbefore described; all and singular which said premises are in such inquisition stated to be particularized in the said warrant, and to be by the said act of parliament authorized to be taken by the said Company for the purposes in the said act mentioned, but which *this deponent asserts is not the fact*; whereupon the said sheriff did pronounce and give judgment for such purchase money so assessed, &c. And deponent further objects, that the said inquisition does not set forth

1. An affidavit for a certiorari, to remove an inquisition taken to assess compensation under a railway act, should set out an exact copy of the inquisition, or account for the omission.

2. Such an affidavit should also distinctly set out particular facts, sufficient to raise a question of law and a presumption of error in the inquisition. An affidavit, therefore, which, after reciting that the inquisition stated certain lands were authorized to be taken under the act, added generally, "which deponent asserts is not the fact," is insufficient.

3. The following words in an affidavit, "and deponent further objects" that there was no notice, &c. are bad, as

not amounting to a categorical allegation.

1858.

 The QUEEN
 v.
 MANCHESTER
 and LEEDS
 Railway
 Company.

or contain, either in form or in substance, the notice commonly called the notice to treat, required by the said act to be given," &c. &c. (a).

Cresswell, Sir *W. W. Follett*, and *Tomlinson*, shewed cause, and, after speaking to the validity of the inquisition on the merits, contended that the rule must be discharged, as it had not been drawn up on reading the inquisition, so as to give the Court an opportunity of seeing whether the property mentioned in the inquisition corresponded with the property mentioned in the schedule of the act. They also contended that the phrase in the affidavit, "objects that the said inquisition does not set forth, &c." was not equivalent to an allegation on oath to the same effect.

Sir *F. Pollock* and Sir *G. Lewin*, *contra*. It is not necessary that the Court should inspect the inquisition in the first instance, as the immediate object of this rule is not to quash it, but simply to bring it before the Court, in order that they may see whether it is not defective. For this object sufficient foundation is laid by Mr. *Taylor's* affidavit. The act is a public act, and the schedule limits the powers of the Company, which appear from the affidavit to have been exceeded. The affidavit stating that the deponent "objects" that the inquisition does not contain the notice, necessarily involves a substantive allegation to the same effect—the deponent objects on oath to this, to wit, that the inquisition does not contain a notice.

LORD DENMAN C. J.—No doubt a certiorari should issue in this case, if it appeared that the Company had taken any thing from the applicant which ought not, under the powers of the act, to have been dealt with as the subject of an inquisition. But to make this appear, the inquisition should have been set out on affidavit, or, if a copy of it could not

(a) Other affidavits were used on moving for the rule, but are not material to this case.

be obtained, the applicant for this rule should have stated his positive belief that the inquisition contained some particular thing unauthorized by the act. That course has not been adopted in this instance, by his stating that he "objects" that the inquisition does not contain the requisite notice to treat. If the objection itself be good, it is not presented to us properly; it amounts to no more than saying that the objection is a *bonâ fide* objection. It should also have been stated distinctly, that the lands taken were not authorized to be taken by the act; it is not enough that they may not have been inserted in the schedule, for lands omitted thereout by mistake may also be taken. The inquisition, according to the recital in the affidavit, states that the lands were authorized to be taken; the affidavit says simply that this is not the fact, without saying how it is not the fact, or saying affirmatively what the fact is, and setting out the evidence on which the deponent arrives at his conclusion. On the whole, I consider the affidavit defective; and even if it disclosed a *primâ facie* case, that would, on the general rules of evidence, be unsatisfactory, as it has not accounted for not making a complete case. I entirely disclaim the doctrine that it would be proper for us to issue the *certiorari* in the first instance, and to inquire afterwards whether the inquisition were defective; it ought to be distinctly impeached in the outset as labouring under some defect, although we need not pledge ourselves that such defect is fatal, which would be matter for future consideration. Here, no matter of fact is distinctly sworn to, from which a question of law may arise, and this rule must be discharged.

LITTTLEDALE J. concurred.

PATTERSON J.—With regard to the word "object," it was contended that it is used in the affidavit to signify that deponent swears to the matter of fact on which his objection is founded. If that be the meaning, why did not he

1838.

 The QUEEN
 v.
 MANCHESTER
 and LEEDS
 Railway
 Company.

1838.

 The QUEEN
 v.
 MANCHESTER
 and LEEDS
 Railway
 Company.

use the ordinary form? If it means any thing else, it will not do. I will never encourage the employment in affidavits of any but the plain and common forms of allegation. With respect to the phrase, "which deponent asserts is not the fact," I agree that he ought to have explained how it was not the fact.

WILLIAMS J.—A strong presumption should be raised of some error in the inquisition to warrant the certiorari, and the affidavit should have set out the inquisition, or given some reason for not doing so. A different course is allowed in removing convictions into this Court, for they are not formally drawn up at the time of conviction, and often not until after the certiorari has issued, so that the writ never could be allowed at all, if we required a copy of them as a preliminary. But in this case the inquisition is in a complete form, and the contents of it should have been brought before us.

Rule discharged.

Friday,
 June 1st.

CODRINGTON v. LLOYD.

Where a writ of capias ad respondendum has been set aside for irregularity, the attorney who sued it out is liable in trespass.

TRESPASS and false imprisonment, on the 6th July, 1835. Pleas: 1, not guilty; 2, that before and at the time when &c., the defendant was and is an attorney of &c., and that the plaintiff being indebted to one *F. Paipleif* in 112*l.*, the said *F. P.* retained the defendant to sue out a certain writ, called a capias, against the plaintiff; whereupon the defendant, on the 27th June, 1835, sued out a writ of capias, directed to the sheriff of Kent, and averred the caption of the plaintiff by the sheriff under this writ, on the 27th June. The replication newly assigned a trespass &c. on another and different occasion, to wit, on the 6th July, 1835. The plea to the new assignment was in substance as follows: that before and at the said time when &c., the defendant was an attorney of &c., and that the plaintiff was

indebted to *F. Paipleif* in 112*l.*, and that the said *F. P.*, for the recovery of his said debt, retained the defendant, so being such attorney as aforesaid, to sue out a certain writ, called an alias *capias*, against the plaintiff, at the suit of *F. P.*, whereupon the defendant, before &c., to wit, on the 30th June, 1835, as the attorney for the said *F. P.*, and by virtue of his retainer in that behalf, and in the discharge of his duty as such attorney for the said *F. P.*, and by his command, sued out an alias writ of *capias* against the plaintiff, at the suit of the said *F. P.*, directed to the sheriff of Hampshire, and then averred a caption of the defendant by the sheriff of Hants, under the said writ of alias *capias*, on the 6th of July, *quæ est eadem*, &c.

1838.

 CODRINGTON
 v.
 LLOYD.

The replication stated that the said writ of *capias*, dated 30th June, in the third plea mentioned, under and by virtue of which the defendant attempts to justify &c., was on the day and year last aforesaid irregularly sued and prosecuted out of the said Court of &c. And the plaintiff says, that afterwards, to wit, on the 19th July, 1835, by a certain order then made by the Right Honourable Sir *James Parke*, Knight, one of &c., bearing date &c., and which said order was afterwards duly made a rule of Court, it was ordered that the said writ of *capias* should be set aside for irregularity. Verification.

General demurrer and joinder.

The points stated for argument in the margin of the paper books were in substance as follows: that a party *bonâ fide* concerned in the execution of a writ, not being the plaintiff in the cause, may justify under such writ, though it be afterwards set aside for irregularity; and that an attorney acting *bonâ fide* under the instructions of his client, is not liable in trespass, although the writ which he has sued out be afterwards set aside for irregularity.

James, in support of the demurrer. This is an attempt to make an attorney liable in trespass, because in his character of attorney he had sued out a writ of *capias* which was afterwards set aside for irregularity. It is not attempted

1838.

CODRINGTON
v.
LLOYD.

to be alleged that the writ was void, and there only appears on the record a mere non-compliance with the practice of the Court. [*Patteson J.* As far as a plea of the practice of the Court goes, it was expressly held in *Elliot v. Lane* (a), that it cannot be pleaded. Here, it appears that the writ was set aside, which may make a difference.] The only cases in which it has been held that an attorney is liable in trespass, are *Barker v. Braham* (b) and *Bates v. Pilling* (c), but in both those cases the writ was void ab initio, and not voidable, as here. There is no allegation whatever on the record to shew that the defendant was in fault, and it is evident, that if the plaintiff had not come within four days to set aside the writ, the writ would have been good; then how can the defendant be a trespasser for suing it out? At all events the attorney cannot be liable, whatever the party to the action may be.

Kinglake, contra. No such distinction exists as is contended for, between a writ void and voidable. The only distinction to be found in cases of this nature, is in favour of officers who execute the writ, and who, it is held, may justify under an irregular writ, although the parties, i. e. the attorney and his client, who sue it out, cannot. In *Philips v. Biron* (d), the reason of this is pointed out, viz. that an irregularity is in the privity of the plaintiff or his attorney, and therefore they are liable in trespass, for which *Turner v. Felgate* (e) is cited. In *Parsons v. Lloyd* (f) the same law is laid down, and the distinction pointed out is recognized in favour of officers only. It is true that in *Rex v. Harrison* (g), an action of trespass, in which there was a plea of justification under a writ of ca. sa., Lord *Ellenborough C. J.* threw out an observation, "there

(a) 1 Wils. 334. See also *Cherry v. Powell*, 1 D. & R. 50.

(b) 3 Wils. 368.

(c) 6 B. & C. 38; S. C. 9 D. & R. 44.

(d) 1 Str. 509.

(e) T. Raym. 73; S. C. 2 Sid. 125.

(f) 2 W. Bl. 845; S. C. 3 Wils.

341.

(g) 15 East, 612.

might be some doubt, even if we were to consider the writ as having been quashed in toto, whether the party who acted at the time under existing process, though irregular for its excess, could be exposed to be sued as a trespasser, because the Court afterwards quashed it." The reporter, however, has appended a note to that remark, in which the cases are collected, and which clearly prove, that where a writ has been set aside for irregularity, the parties issuing it out may be sued in trespass. The practice of the Court also shews that trespass is maintainable, for in setting aside a writ for irregularity, the Court always impose as a term that no action shall be brought. As to any distinction between an attorney and his client, the cases cited shew that there is none; and if any, it would be against the attorney. In *Loton v. Devereux* (a), where the attorney alone was sued in trespass, the point was not even raised.

1836.

 CODRINGTON
 v.
 LLOYD.

James, in reply. A broad distinction exists between an attorney and his client in these cases. An attorney acts ministerially, and as an officer of the Court, in suing out a writ; he therefore falls within the distinction taken in all the cases in favour of officers. To make an attorney liable at all, negligence should be shewn, but then the action should be brought in case. The consequences are serious, if an attorney should be held liable in trespass for the slightest misprision of his clerk in suing out a writ. In *Noel v. Isaac* (b) it was distinctly held, that trespass is not maintainable for taking an attorney on a *capias ad respondendum*, notwithstanding his privilege, but that the action must be case if it lie at all. There was no plea of justification in *Bates v. Pilling* (c) or *Barker v. Braham* (d); the exception claimed for an attorney therefore could not be discussed there.

Lord DENMAN C. J.—The plaintiff has been arrested

(a) 3 B. & Ad. 343.

(b) 1 C. M. & R. 753.

(c) 6 B. & C. 38; S. C. 9 D. &

R. 44.

(d) 3 Wils. 368.

1838.

 CODRINGTON
 v.
 LLOYD.

upon a writ which has been set aside for irregularity, the case therefore stands, so far as respects the defendant, as if he had been arrested without any writ at all. The only question is, whether in such a case there is any distinction between the party who ordered the writ to be sued out, and the attorney who issued it. In *Bates v. Pilling (a)*, where the writ was irregular, the attorney was held liable in trespass, and in *Barker v. Braham (b)*, the liability of an attorney was discussed at great length. We do not find that any doubt has ever been entertained as to the liability of an attorney in such a case; and indeed where a writ is set aside for irregularity, he is the party who ought to be especially liable.

LITLEDALE J.—An attorney cannot be considered a ministerial officer in the sense contended for. The servants of the sheriff, who execute a writ, cannot know the existence of any irregularity that may have occurred; but this is or ought to be known to the attorney who has been the party to issue out the writ. In *Barker v. Braham (b)*, and *Bates v. Pilling (a)*, where the attorney was sued in trespass, as well as his principal, it is true that there was only the plea of not guilty, but the question of the attorney's liability was very fully discussed, and it is clear from those cases, and upon principle, that no exception exists in his favour.

PATTESON J.—Mr. *James's* argument goes too far, for it would shew that no action would lie even against the principal, for I see no distinction between the attorney and his client. If such an action were brought against him, he could not justify under the writ, because it had been set aside, so neither can the attorney. If this had been a case in which the proceedings were void ab initio, but in which the attorney had acted according to his retainer, and within the line of his duty, there might be some ground for the

(a) 6 B. & C. 38; S. C. 9 D. & R. 44.

(b) 3 Wils. 368.

argument in his favour, and he might have been brought within a case in *Espinasse* (a), I think: but in the case of an irregularity, which is his own or his clerk's act, he is the person immediately liable.

1838.
—
CODRINGTON
v.
LLOYD.

WILLIAMS J.—The argument for the defendant seems addressed to the form of action only. But the writ here being irregular, the arrest was illegal, and the defendant was the immediate party by whom that was effected.

Judgment for the plaintiff.

(a) Probably *Sedley v. Sutherland*, 3 Esp. 202.

SWAN v. PHILLIPS.

Friday,
June 1st.

CASE. The declaration stated that the defendant heretofore, to wit, on the 1st of April, 1834, the defendant then being an attorney and solicitor, applied to the plaintiff to lend to one *W. J. Jellicorse* the sum of 300*l.* at 5*l.* per cent. per annum. And the defendant then contriving &c. to defraud the plaintiff, and to induce her, the plaintiff, to lend to the said *Jellicorse* the said sum of 300*l.* upon interest as aforesaid, and to take no further security from the said *Jellicorse* for the repayment to her, the plaintiff, of the said sum, with such interest thereon as aforesaid, than the promissory note of the said *Jellicorse* for the said sum &c., he the defendant then falsely and deceitfully represented to the plaintiff, that she, the plaintiff, might safely lend to the said *Jellicorse* the said sum of 300*l.*, and take no further security for the repayment thereof, with such interest as aforesaid, than such promissory note as aforesaid, because the title-deeds to a certain estate, which he the defendant then asserted and represented that the said *Jellicorse* had just bought, were in the possession of him the defendant, and that nothing could be done without the knowledge of

A representation by the defendant that money might be safely lent to *A. B.*, because the title-deeds to an estate, which *A. B.* had just bought, were in defendant's possession, and that nothing could be done without the knowledge of the defendant, and that plaintiff would be safe in making the loan, is a representation as to the ability of *A. B.* within the 9 *Geo. 4*, c. 14, s. 6.

1838.

 SWAN
 v.
 PHILLIPS.

the defendant, and the plaintiff would be perfectly safe in making such loan to the said *Jellicorse* upon the terms aforesaid. By means of which said false representations the defendant did then fraudulently and deceitfully induce, persuade, and encourage the plaintiff to lend and advance to the said *Jellicorse* the said sum of 300*l.* upon interest, at the rate aforesaid, and to take no further security from the said *Jellicorse* for the repayment to her, the plaintiff, of the said sum of 300*l.*, with such interest thereon as aforesaid, than the promissory note of the said *W. J. Jellicorse* for the sum of 300*l.*, with such interest as aforesaid. The declaration then averred, that the plaintiff confiding &c. in the said representation, did lend the said *W. J. Jellicorse* 300*l.* upon his promissory note ; that at the time of the said representations she could not safely lend as aforesaid, without taking further security than such promissory note, and that the said title-deeds were not at the time of the said representation in the hands of the defendant, all which &c. the defendant well knew ; that the loan had not been repaid, and that *Jellicorse* had since been adjudged a bankrupt.

2nd Plea :—That the said representations related to the ability of the said *Jellicorse*, to wit, his ability to repay the said sum of money in the declaration mentioned to have been lent by the plaintiff to *Jellicorse* ; and that the said representations were not, nor was any part thereof, ever made in writing signed by the defendant. Verification.

General demurrer and joinder.

The marginal note stated, that the matter of law intended to be argued was, that the second plea afforded no answer to the action, inasmuch as the said representations related to the possession of the deeds in the declaration mentioned, and not to the ability of *Jellicorse*, within the meaning of 9 *Geo. 4*, c. 14, s. 6, upon which that plea is founded, and consequently that such representations need not have been made in writing.

R. V. Richards in support of the demurrer.—The 9

Geo. 4, c. 14, s. 6, enacts, "that no action shall be maintained, whereby to charge any person, upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith." The question is, whether it was necessary that the defendant's representation should have been in writing, under this section, in order to make him chargeable. The representation contemplated by the statute relates to the ability or credit of the person spoken of; but this representation, that the plaintiff might safely lend, because the title-deeds of an estate purchased by *Jellicorse* were in the defendant's hands, and that nothing could be done with them without the defendant's knowledge, seems to relate rather to the defendant himself than to *Jellicorse*. But assuming it to apply to *Jellicorse*, it rather represents his want of ability than otherwise, for it states that he had not possession of his own title-deeds. It cannot be held, when inquiry is made relative to a person who is negotiating a loan, that every representation concerning him must necessarily relate to his personal ability to pay. Suppose the defendant had fraudulently represented that *Jellicorse* was in London, whereas he was in Cornwall, the plaintiff might choose rather to lend to a person in London than in Cornwall, and the defendant might be liable to an action for his deceit; but it cannot be contended that such a representation would relate to the ability &c. of *Jellicorse* within the statute. The recent case in this Court of *Haslock v. Ferguson* (a), may be passed by, because there the representation distinctly related to the ability of the person spoken of. In *Lyde v. Barnard* (b), the representation that Lord *Edward Thynne's* interest in a certain fund was only charged with three annuities, had a much more obvious connection

1838.

SWAN
v.
PHILLIPS.

(a) 2 N. & P. 269.

(b) 1 M. & W. 101.

1838.

SWAN
v.
PHILLIPS.

with the statute than the present case. There, however, the Court were equally divided; *Alderson B.* observing that a class of cases, commencing with *Pasley v. Freeman (a)*, had virtually repealed the Statute of Frauds, which required a guarantee to be in writing, by substituting actions for false representation for actions on a guarantee, and that the object of Lord *Tenterden's* Act was to place them both on the same footing. "The two cases," he says, "are, I think, identical in principle; for a guarantee increases the ability of the third person who is about to be trusted, by adding to the value of his personal responsibility that of the person making the guarantee." He then adds, "I think, therefore, that we should take this as the key to the true construction of Lord *Tenterden's* Act, and if we do so, it seems to follow from it, that a representation to be within the act, must be one by which the value of the personal responsibility of the third person is increased in the judgment of the individual, from whom he is about to obtain credit, money, or goods." Tried by the test suggested, can it be said that the representation, as to the custody of *Jellicorse's* deeds, related to his personal responsibility? [*Wightman*. The plaintiff relies on the words "that the plaintiff might safely lend," without the reason afterwards given.] It is all one statement, and must be taken together: and the plea may be considered, perhaps, as too large, for it says, in effect, that the whole statement related to *Jellicorse's* ability, and should have been in writing. The real representation is, "you may trust, because I have certain deeds in my possession;" the declaration might, perhaps, have been specially demurred to, as alleging mere evidence.

Wightman, contra. — If the representation had been merely that *Jellicorse* might safely be trusted, it seems admitted that it would have related to his ability. Is the meaning then altered, because the subsequent reason assigned for his ability may be a bad one? In *Lyde v. Barnard (b)*, nothing at all was said about Lord *E. Thynne's*

(a) 3 T. R. 51.

(b) 1 M. & W. 101.

ability; the representation was simply as to the state of a particular fund. The plaintiff there was not told, "you may safely lend to Lord *E. Thynne*, because the fund is charged only to this extent;" and *Parke B.* remarks in his judgment, that the question to the defendant, and his answer to it, related to *the fund only*. Here the representation directly relates to *Jellicorse's* "dealings" also, namely, that he had bought an estate; this again distinguishes the present case from *Lyde v. Barnard*(a). The defendant states, in fact, not only that *Jellicorse* is of ability, but particularises what his ability consists of.

1838.

 SWAN
 v.
 PHILLIPS.

R. V. Richards in reply. The former part of the representation cannot be separated from the rest, it all hinges on the reason given; the defendant says, that he has the control of the title-deeds, and therefore that the plaintiff may safely lend. Suppose the action to have gone to trial, would it not be for the jury to say whether the money had not been advanced on that part of the representation, which need not have been in writing? Some stress has been laid on the word "dealings;" but it is only enumerated in the statute as one of those matters helping to constitute personal ability, to representations concerning which alone the statute is directed.

LORD DENMAN C. J.—(After reading the words of the representation.) If the meaning of those words be, that the plaintiff might safely lend, because the defendant, being in possession of the title-deeds, would be cognisant of any attempt on the part of *Jellicorse* to deal with the estate, then, I think, the representation does not relate to *Jellicorse's* ability, and that it is actionable, although not in writing. But I am of opinion that the meaning is more extensive; that the representation is, that *Jellicorse* is a responsible person, possessed of certain property, which cannot be incumbered without the defendant's knowledge; that it relates

(a) 1 M. & W. 101.

1838.

 SWAN
 v.
 PHILLIPS.

to *Jellicorse's* pecuniary ability, and mentions that ability as one reason why he might be safely trusted.

LITLEDALE J.—I understand the representation in this way:—the defendant, an attorney, comes to the plaintiff, and in order to induce him to lend *Jellicorse* money on his promissory note, says, “I have the title-deeds to an estate which he has lately purchased, and therefore you may safely lend to him.” This must be taken as an entire representation, and is just what may be supposed would be given as an answer to any inquiry about *Jellicorse's* ability; the substantial reason given to prevail on the plaintiff is, that the defendant knows *Jellicorse* to be possessed of an estate.

PATTESON J.—The only doubt raised in my mind is by the words, “nothing can be done without my knowledge.” If the representation had not gone farther than the words “because deeds are in my possession,” I should take it to apply distinctly to *Jellicorse's* ability, and to be nothing more than a reason assigned for the knowledge professed of such ability. But the representation proceeds in these words, “nothing can be done without my knowledge.” At first, I thought this might mean that the plaintiff should have the benefit of defendant's custody and control over the deeds; and if that be the meaning, it would be open to Mr. *Richards's* argument, that the representation is confined to the defendant's own acts. But this, it appears to me on consideration, would be a strange meaning to put on the whole representation taken together. I understand the representation to be, “you may safely lend, I know that he has property, the title-deeds are in my possession, and he cannot deal with them without my knowledge,” and that this relates to *Jellicorse's* ability within the statute.

WILLIAMS J.—We ought to look at this representation in the same light in which it would be ordinarily understood. The representation, among other things, is, that

Jellicorse is possessed of an estate; and a possession of this kind, whether it be of land or a purse of money, of course increases the solvency and ability of the possessor. The rest of the representation seems to amount to this, "I am an attorney, I understand these matters, I have his title-deeds, he can do nothing without me, you may therefore safely lend."

1838.

SWAN
v.

PHILLIPS.

Judgment for defendant.

HOPKINS v. HELMORE.

Friday,
June 1st.

COVENANT. The declaration stated, that heretofore, to wit, on the 21st of March, 1828, by a certain indenture then made between the plaintiff and the defendant, &c., the plaintiff demised unto the defendant a certain messuage &c., to have and to hold the said messuage &c. from the 25th March then instant, for and during the term of seven years then next ensuing, wanting seven days, yielding and paying therefore yearly and every year, during said term, unto the plaintiff, the yearly rent of 285*l.*, clear of all taxes and deductions whatsoever (except land tax and ground rent), by four equal quarterly payments, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December, in every year, *commencing from said 25th March then instant.* And the defendant did thereby, for himself, his heirs &c., covenant and agree with the

Declaration in covenant stated that the plaintiff, by indenture dated the 21st March, 1828, demised certain premises, from the 25th March then instant, for and during the term of seven years then next ensuing, wanting seven days, to the defendant, yielding and paying therefore yearly and every year, during said term, the yearly rent of 285*l.*, by four equal quarterly payments, on the 25th March, the 24th June, the 29th September, and the 25th December, in every year, *commencing from said 25th March then instant*, and that defendant covenanted to pay rent accordingly, but that in breach thereof, in the last year of the said term, he had only paid half of the rent, and that on the 25th March, 1835, there was due 140*l.* for two quarterly payments. The defendant pleaded payment into Court of the first quarter, and demurred generally to the insufficiency of the alleged breach of covenant, in respect of the last quarterly payment, on the ground that it appeared on the face of the declaration that the second quarter's rent, mentioned in the breach, did not become due "during the term," as stipulated in the covenant. The Court gave judgment for the plaintiff, construing the covenant to be for payment of a beforehand rent, the first quarter being payable on the 25th March, 1828, the day of the commencement of the term, so that the whole rent was payable within the term.

1838.


 HOPKINS
 v.
 HELMORE.

plaintiff, that he the defendant should and would, yearly and every year, during the continuance of said demise, well and truly pay, or cause to be paid, unto the plaintiff, the said yearly rent of 285*l.*, clear &c., on the days and in manner thereinbefore appointed for payment thereof. The declaration then stated the entry of defendant, and after averring performance by the plaintiff of all things in the indenture to be performed on his part, alleged, as breach of the defendant's covenant, that defendant did not in every year, during the continuance of said demise, pay or cause to be paid unto said plaintiff said yearly rent or sum of 285*l.*, clear &c., but on the contrary thereof, in the last year of said term in said indenture of demise, the defendant wholly omitted and neglected to pay to the plaintiff any greater part of said yearly rent of 285*l.* than one-half part thereof, and on the 25th of March, 1835, a large sum of money, to wit, the sum of 140*l.* of the rent aforesaid, for two quarterly payments of said yearly rent of 285*l.*, after deducting land tax and ground rent, chargeable for and in respect of said demised premises during the same two quarters, on that day, in that year, became and was due and payable from defendant to plaintiff, and is still in arrear and unpaid to plaintiff, contrary to the tenor and effect and meaning of said indenture, and of said covenant, &c.

Plea: the defendant, as to 71*l.* 10*s.*, parcel of said sum of 140*l.*, being so much of the said sum of 140*l.* as became due as and for the first of the said two quarterly payments in the declaration alleged to have become due and payable on the 25th day of March, 1835, says that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of 71*l.* 10*s.*, ready to be paid to the plaintiff. Denial of damages ultra, and verification.

And the defendant, as to the alleged breach of covenant, in respect of the non-payment of the second and last quarterly payments, in the declaration alleged to have become due upon the said 25th of March, 1835, says, that the same is not sufficient in law. Joinder in demurrer.

In the margin the cause of demurrer was stated to be, that it appeared on the face of the declaration that there was no day within the term upon which the second quarter's rent, mentioned in the breach, became due.

1838.

 HOPKINS
 v.
 HELMORE.

Ogle, in support of the demurrer. The term expired on the 18th March, 1835, and the breach of covenant is the non-payment of rent on the 25th March, 1835, seven days after the term ended. As there are certain days specified by the demise for payment of rent, "yearly and every year, during the said term," rent was payable on such days only, and cannot be recovered as payable on a day after the term had expired (a). It may be said that the intention of the parties must have been that rent should be paid for the last quarter, but their intention can only be gathered from the express words of the lease. If any rent is to be paid for the last quarter, the remedy for it is debt, and not covenant.

J. Bayley, *contra*.—The habendum is from the 25th March then instant, for seven years, wanting seven days, and the reddendum "paying therefore yearly and every year during the said term," a certain rent, by four equal quarterly payments. If the argument raised on the words of the reddendum be good for any thing, it would follow that rent was reserved payable for six years only, and not for any part of the seventh year, for, reckoning by quarter days, there are only six years. But the words "paying therefore yearly and every year during the said term," are to be taken together, and "every year" is to be applied to the term, and not to the quarter days which might fall within the term; and the meaning is, that 285*l.* was to be paid seven times,

(a) In *Barwick v. Foster*, Cro. Jac. 227 & 233; *S. C.* Yelv. 167; where there was a covenant to pay rent at Lady-day and Michaelmas yearly, or within ten days after, and the term ended at Michaelmas, the declaration alleged a non-payment of the rent for the term ending at Michaelmas last; the Court held,

(having first been of a contrary opinion), that the declaration was good, although the rent was not payable till ten days after the last Michaelmas during the term, and that being reserved yearly, the ten days should be rejected at the end of the term.

1838.

 HOPKINS
 v.
 HELMORE.

once for each year in the term, and that the last quarter was to be paid seven days after the end of the term. Effect must be given to the word "yearly." In *Hill v. Grange* (a), a demise from the 6th August, for twenty years, "yielding therefore *yearly* to the aforesaid *Henry*, and his heirs, 40s., at two terms of the year, viz. at the feast of the Annunciation of the Blessed Virgin Mary, and of St. Michael the Archangel, to be paid by equal portions," &c., was construed so as to entitle the landlord to twenty years' entire rent. It was contended (b) that the first rent was payable on Michaelmas-day, that the words of reservation were "yielding *annually*," which words ought to be fulfilled, and if rent should not be paid at the first Michaelmas, then it would not be paid annually, for in the first year he would only have rent for half a year, because the first year commenced in August and ended in August, and if he should have no more than rent for half a year at Lady-day, then he would not have annually 40s., but only 20s. for the first year; and that the terms "Annunciation" and "St. Michael" were intended to point out the days of payment, rather than the commencement of the reservation, so that it might stand well with the intention of the parties to make the payment commence at Michaelmas; and the Court agreed to this reasoning, and it was ruled accordingly. [*Littledale J.* There the lease was for twenty entire years, here it is for seven years wanting seven days.] It shews that a quarter's rent may be recovered, although there may not be a full quarter's occupation, and that effect must be given to the word "yearly." The rent for the last quarter in this case is reserved payable after the term has expired. There is no objection in law to such a reservation, and the only consequence will be, that the lessor will not have his remedy by distress; *Hutchins v. Scott* (c). [*Littledale J.* The rent in this case is reserved payable during the term, not after it.] It is reserved "yearly and every year during the said term," not on quarter days during the term. This question arises on general demurrer, and the language of the

(a) 1 Plowd. 164.

(b) Ibid. 171.

(c) 2 M. & W. 899.

breach will be found not to be open to the objection taken. The essential part of the breach is, that "defendant did not in every year during the continuance of the said demise pay, or cause to be paid, unto said plaintiff, said yearly rent or sum of 285*l*." It is true that the breach proceeds to specify, that "on the 25th March a large sum of money, to wit, the sum of 140*l*. of the rent aforesaid, for two quarterly payments of said yearly rent &c., on that day in that year became due, and was due and payable from said defendant to plaintiff," &c. But these latter particulars are immaterial, and the former part of the breach is alone to be attended to. In *Baden v. Flight* (a), which was covenant on a lease, the breach alleged, that during the term, to wit, on the 25th March &c., the sum of &c., for two quarters, ending &c., became due; and *Tindal* C. J. said, in giving judgment, "It appears to me that the allegation in the declaration is this, that during the term two quarters' rent became due and in arrear, and though a particular day is specified, that carries it no further; the substantial allegation is, that the rent became due during the term. It is no answer to that allegation to say, that the rent did not become due on a particular day." [*Patteson* J. For any thing that appears in the breach the rent might have been due for some previous quarter. We ought to help you if we can.] In *Long v. Burroughs* (b) the Court appears to have assisted the plaintiff by a similar intendment.

Ogle, in reply. The proceeding of the Court in *Hill v. Grange* (c) is in the defendant's favour, for they reversed the order of rent-days, in order to avoid the very difficulty which the present plaintiff is in, that is, to avoid holding that the plaintiff in that case could recover a quarter's rent from Lady-day to Michaelmas, although the term itself expired in the intervening August. It is said that the breach does not shew which particular quarter's rent is claimed; but that is not so, for the breach admits payment

(a) 3 Bing. N. C. 685.

(c) 1 Plowd. 164.

(b) 1 Ld. Kenyon, 247.

1838.

HOPKINS
v.

HELMORE.

1838.

 HOPKINS
 v.
 HELMORE.

of 140*l.* for half a year's rent, which sum, in the absence of any specific appropriation, would be for the first half-year. If there had been a plea of payment on the record, it would not be supported by proof that 140*l.* had been paid without appropriation at the time for half a year's rent.

Covenant for part of the rent cannot be brought against a lessee, who is liable on his personal contract; *Stevenson v. Lambard* (a). [*Bayley*. The plaintiff does not claim part, but the whole.]

LORD DENMAN C. J.—The contract entered into on the part of the defendant, is to pay 285*l.* in each year during the term. This contract may be fulfilled without extending it to any quarter days beyond the term, by understanding that the rent contemplated by the parties was a beforehand rent. Thus the first payment will be due on the 25th March, 1828, the very day of the commencement of the term, instead of on the 24th June following, and the order of quarter days, as given in the reddendum, will be strictly complied with. In this way 285*l.* will be payable every year, for the last year as well as the others, although it is seven days short of a full year, and the whole sum will be payable according to the terms of the covenant, and during the term.

LITLEDALE J.—The lessee has clearly contracted to pay 285*l.* every year, by four quarterly payments, and is to pay this sum for the last year also, although wanting seven days of a complete year. The lease is very inartificially drawn, and it is somewhat difficult to reconcile the various parts of it, unless by reading “commencing *from* said 25th March then instant,” in the reddendum, to mean “*on*” that day, and understanding the rent agreed on to be beforehand rent, the first quarter to be payable on the same 25th March, which rent-day is mentioned first in order. By enumerating the quarter days in a particular order, the parties must be presumed to have meant that the payments were to be made in that order. The signification of the

(a) 2 East, 575.

word "from" is sometimes inclusive and sometimes exclusive, so that it presents no difficulty to such a construction of this contract, as will best effectuate the intention of the parties.

1838.

 HOPKINS
 v.
 HELMORE.

PATTESON J.—On reading the contract as set out in the declaration, I have no doubt whatever that the parties meant that 285*l.* should be paid seven times, and there is very little difficulty in this construction, if a pause is made before the words "by four equal quarterly payments." The words "commencing from said 25th March then instant," are intelligible enough, if applied to a beforehand rent, which I think was contemplated by the parties, although there is force in what Mr. Bayley has said, that "yearly and every year during the said term," may mean that the rent should be paid in any year during the term on those particular days, so that this is an express covenant to pay, as he puts it, even seven days after the term has expired.

WILLIAMS J. concurred.

Judgment for the plaintiff.



HALL v. MAULE and others.

(*In Prohibition.*)

Friday,
 June 1st.

THE declaration stated, that the defendants, on the 13th of July, 1833, prosecuted a plea in the Consistory Court of Bristol, against the plaintiff, wherein the defendants did exhibit a certain libel against plaintiff. [The declaration then set out a libel by the defendants, as churchwardens of the parish of St. Philip and St. Jacob, in the city of Bristol, in which they libelled the plaintiff for non-payment of a church

Where the plaintiff declared in prohibition that he had been libelled by the defendant in a Spiritual Court, for non-payment of a church-rate, and that he had excepted to the libel on different grounds, one of which was as to the construction of an act of parliament, and averred that the said exceptions were not the subject of ecclesiastical cognizance, and thereupon prayed for a writ of prohibition:—Held, that he had shewn no ground for prohibition, as it did not appear that the Court below were proceeding to decide on the act of parliament, or that it would decide contrary to the common law.

1838.

 HALL
 v.
 MAULE
 and others.

rate of 10s., made on the 22d of March, 1833.] The declaration then averred that the plaintiff afterwards, to wit, on &c., did exhibit and file in the said Court divers exceptions to the said libel of defendants, wherein, amongst other things, it was alleged as follows: that is to say, [the declaration then set out the exceptions at length, which in substance were,] that in the month of March, 1832, the rate-payers of the parish of St. Philip and St. Jacob had adopted the 1 & 2 Will. 4, c. 60; that vestrymen were chosen under the act, on the 21st of May, 1832; that the vestry of the 22d of March, 1833, was not duly assembled under the 58 Geo. 3, c. 69; that the rate in question was made for adding to the fabric of the church, and for other purposes (specified), without any meeting of the rate-payers having been previously held, to give their consent, and also for the payment of divers salaries, costs, and charges, to which the inhabitants were not liable. [The declaration then concluded,] that the said exceptions, so filed by the plaintiff as aforesaid, were duly admitted by the said Court, to wit, on the 28th of December, 1833, and because the several matters before mentioned in the said exceptions of the plaintiff are not the subjects of ecclesiastical cognizance and jurisdiction, but are only properly to be tried in the temporal Courts of this land, the plaintiff prays the judgment of this Court, that her Majesty's writ of prohibition may issue out of this Court of our said Lady the Queen, before the Queen herself, to prohibit the judge of the said Consistory Court from proceeding further in the said suit.

The defendants pleaded several pleas; but it is unnecessary to give the pleadings, as the judgment of the Court proceeded on the declaration.

Peacock appeared in support of the demurrers to the replications, but the Court called on *Godson* to support the declaration.

Godson. The declaration in this case is almost precisely

the same as in *Blacket v. Blizard* (a). There a rate had been made by a select vestry under an act of parliament, and the Court held, that as the vestry did not consist of the proper number, the Ecclesiastical Court could not entertain the suit. The question in this case also is, whether the rate was made by the proper parties under the 1 & 2 Will. 4, c. 60, and this Court is the proper tribunal to decide it. In *Byerley v. Windus* (b), it was contended, that as the parties were not at issue in the Spiritual Court, prohibition could not go; but this Court overruled the objection. In *Cockburn v. Harvey* (c), also, where the question was, whether a select vestry, appointed under an act of parliament, could make a church rate, this Court directed a prohibition. [Putterson J. In those cases no question was made, whether the Court below was proceeding in the suit. In *Blacket v. Blizard* (a), it appears, that after the plaintiff had excepted to the libel, and prayed the spiritual judge to dismiss it, for want of jurisdiction, he nevertheless admitted the libel. That must mean, that the judge overruled the exception, and thereby decided on the act of parliament which gave rise to the exception. Lord Denman C. J. The judgment of the Court, in *Blacket v. Blizard* (a), proceeded entirely on the ground that the Spiritual Court had decided wrong on the act of parliament.] It appears by the exceptions to the libel set out in the declaration, that the plaintiff's case depends on the construction of the act of parliament.

1838.

 HALL
 v.
 MAULE
 and others.

LORD DENMAN C. J.—It does not at all appear that there is any dispute as to the act of parliament, it may be admitted in the Court below, or they may put a right decision upon it. There is no ground therefore at present for prohibiting the Court below from proceeding. If the facts

(a) 9 B. & C. 851; S. C. 4 R. 564.
 Mann. & R. 641. (c) 2 B. & Ad. 797.
 (b) 5 B. & C. 1; S. C. 7 D. &

1838.

HALL
 v.
 MAULE
 and others.

were raised as in *Blacket v. Blizzard* (a), it would be a different question. If, on the construction of the act, the Court below decide erroneously, the prohibition may go as in *Gould v. Gapper* (b).

LITTLEDALE J. concurred.

PATTESON J.—The Court below, I understand, have come to no decision upon the act of parliament, therefore you cannot amend.

WILLIAMS J. concurred.

Judgment for the defendants.

(a) 9 B. & C. 851; S. C. 4 (b) 5 East, 345.
Mann. & R. 641.

Friday,
 June 1st.

MEYER v. HAWORTH.

Assumpsit for
 goods sold.
 Plea, cover-
 ture. Repli-
 cation, that at
 the time when
 the debt was
 contracted, the
 defendant was
 living apart
 from her hus-
 band, in a
 state of adul-
 tery; that the
 plaintiff, with-
 out knowledge
 of these cir-
 cumstances,
 dealt with her
 as a feme sole,
 and that after
 her husband's
 death, in con-
 sideration of
 the premises, she promised:—Held to be a departure from the declaration.

ASSUMPSIT for goods sold and delivered, goods bar-
 gained and sold, work and labour, money paid and interest,
 and on an account stated. Plea, that at the time of making
 the said promises the defendant was the wife of one *John*
Haworth. Replication, that at the time the several debts
 were contracted by the defendant she was living separate
 and apart from her alleged husband, and in open adultery
 with one *W. J. R.*, and the said *John Haworth* was not
 liable for nor bound to pay, nor did pay the said debts so
 contracted by the defendant, whilst she was so living sepa-
 rate and apart from him, and in open adultery with the said
W. J. R. as aforesaid, and that at the time of the sale and
 delivery, &c. &c. in the declaration mentioned, he the plain-
 tiff did not know that the defendant was the wife of the
 said *John Haworth*, or was living in a state of open adultery

—Held to be a departure from the declaration.

as aforesaid, and dealt with her as a feme sole; and that the defendant, after the death of the said *J. Haworth*, and before the commencement of this suit and whilst the said several debts were due, to wit, on &c., in consideration of the premises, promised the plaintiff to pay him the said several sums in the declaration mentioned, when she should be thereto afterwards requested, but that she had not paid the same. Special demurrer.

1838.

 MEYER
 v.
 HAWORTH.

Streeten in support of the demurrer.—The replication is a departure from the declaration. The declaration is for goods sold &c. to a feme sole; the replication admits that she was then under coverture, and relies upon a promise after her discoveriture. The declaration alleges a debt to have been the consideration of the promise, and the replication alleges that it was a moral obligation. Evidence of the facts stated in the replication would not prove the declaration; *Littlefield v. Shee* (a); that case also and *Barden v. De Keverberg* (b) shew that the replication in this case discloses no cause of action, whereas in the declaration there is a cause of action.

Humfrey, contra.—*Littlefield v. Shee* (a) and *Rex v. Flintan* (c) shew, that no one could have been sued on the original contract, and *Lee v. Muggeridge* (d) proves that a debt contracted during coverture is a good consideration for a promise made after discoveriture. There is, therefore, no departure, for there is only one promise set up on the pleadings, and the replication supports the declaration by shewing how the defendant made herself liable in respect of the subject-matter of the contract. The replication answers to the declaration in this case, just as, on an issue upon a plea of the statute of limitations, the evidence for the plaintiff answers to the declaration. It cannot be said that evidence is there given of a promise not contained in the

(a) 2 B. & Ad. 811.

(b) 2 M. & W. 61.

(c) 1 B. & Ad. 227.

(d) 5 Taunt. 36.

1638.

 MEYER
 v.
 HAWORTH.

declaration (a), nor can it be said now that the replication contains any other promise than that declared upon. [*Patteson J.* Here the declaration states there was a debt antecedent to the promise, and the replication shews that there was no antecedent debt.] That is not to be assumed against the plaintiff; he should have the benefit of any state of things under which there might have been an antecedent debt; as that the defendant's husband was civiliter mortuus when the goods &c. were had.

Streeten in reply.—There is nothing in the replication to shew that the wife was ever in a situation to contract. In *Lee v. Muggeridge* (b), the new promise was specially declared on.

Per Curiam (c).—The replication does not support the declaration, the consideration for the promise in the one is goods sold, and in the other, moral obligation. If the moral obligation stated is a sufficient consideration, it should have been stated in the declaration. Where to a plea of infancy the plaintiff replies, that the infant affirmed the contract on coming of age, there is no departure from the original promise declared on, which might or might not be avoided. But in this case the original promise was void, and not voidable.

Judgment for the defendant.

(a) See *Tanner v. Smart*, 9 D. & R. 549.

(c) Lord Denman C. J., *Little-
dale, Patteson, and Williams Js.*

(b) 5 Taunt. 36.

Saturday,
 June 2nd.

EVANS v. DAVIES and LUCAS.

In replevin, an avowry justifying the taking of cattle damage feasant in the locus in quo, as the soil of A., and a like avowry as in the soil of B., are allowable under the New Rules, H. T. 4 Will. 4.

REPLEVIN for taking certain horses of the plaintiff, in the parish of Llanyre, in the county of Radnor. The de-

claration states that the plaintiff is seised of a certain parcel of land, and that the defendant has taken and carries away from the said land certain horses of the plaintiff, and that the plaintiff claims the same.

claration in this case being served, the defendant took out a summons to plead several matters, and served the following abstract of the avowries to be pleaded :—

1st. An avowry by defendant *Davies*, and a cognizance by *Lucas*, as bailiff of defendant *Davies*, for damage feasant in the locus in quo, stating that one *James Watt* was seised thereof in his demesne as of fee, and that he demised it to *Davies* as tenant from year to year.

2nd. A cognizance by both defendants as bailiffs to the late King *William* the Fourth, stating that the said king was seised of the locus in quo in fee, in right of his Crown of England.

On the hearing of the summons before a learned judge, his lordship was of opinion that the second cognizance could not be allowed within the rule of Hil. 4 *W.* 4, r. 5, No. 1, and he was of opinion the defendant ought to elect on which he would rely; his lordship, however, postponed making an order till an application could be made to this Court.

Sir *J. Campbell* A. G., on a former day in this term (a), applied to the Court on behalf of the defendant for leave to plead both cognizances. This action is brought in order to try the title to certain lands purchased of the Crown by Mr. *Watt*. The case has already been before the Court in *Doe* d. *Watt* v. *Morris* (b), and in order to ascertain whether the soil in the wastes of the manor passed by encroachment, the plaintiff's cattle were distrained damage feasant; but the above decisions render it doubtful whether the title is in the Crown or in Mr. *Watt*. It is, therefore, proposed to avow on each title, and as it is indispensable to avow on the title of the lord of the fee, justice cannot be done unless permission be granted. It is apparent that these avowries are not the same, they could not be supported by the same evidence, and therefore the judge could not make an amendment at nisi prius, so as

(a) May 28, before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.
(b) 2 Bing. N. C. 189.

1858.
 EVANS
 v.
 DAVIES
 and
 LUCAS.

to substitute one title for another. [The Court then called upon *E. V. Williams*, contra, who appeared to shew cause in the first instance.]

E. V. Williams.—The words of the New Rule, Hil. 4 Will. 4, r. 5, expressly prescribe that “several pleas or avowries shall not be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.” And they further declare, that pleas, avowries, “and cognizances founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin are within the rule,) are not to be allowed.” These rules bring back the law to what it was before the statute of *Anne*, (4 & 5 *Anne*, c. 16, s. 4,) unless it can be made out that a distinct ground of answer or defence is intended to be established. If more than one avowry is sought to be pleaded, it lies upon the defendant to shew that they are not founded on the same principal matter. The principal matter relied upon in the first avowry is, that the cattle were damage feasant on the locus in quo, and that the defendants took them by the authority of the owner of the soil. The principal matter in the second avowry is just the same, with a variation in the statement and description of the owner. This is not like the case where one avowry is made in the name of one commoner, and another in the name of another commoner, for there two distinct and co-existent rights are relied upon; whereas, these avowries are inconsistent, and the facts stated in them cannot co-exist. If Mr. *Watt* was seised in fee, then the king was not so seised. Mr. *Watt* may be under a difficulty how to plead his title, but the principle of the New Rules is to compel him to make an election. The instances given in the New Rules shew that defences, if they are substantially the same, though apparently different, cannot be pleaded together; thus *solvit ad diem* and *solvit post diem* are not allowable, and the defendant must elect. [*Patteson J.* The present case seems nearer the example given, that “a plea of an agreement

to accept the security of *A. B.* in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct and to be allowed." There the agreements are different and might co-exist, but where one plea is an agreement to accept the security of a third party in discharge of the plaintiff, and another describes the agreement to be to forbear for a certain time in consideration of the same security, they are not distinct, being only variations in the statement of one and the same agreement. The test, therefore, whether two pleas may be pleaded together, is, whether they can co-exist or not. It is not, as has been suggested, whether the judge at nisi prius can amend, and the inconvenience alleged from the judge not having that power can have no weight. For suppose a pleader was in doubt whether to declare for goods sold and delivered, or on a guarantee, he could not describe the contract in both ways, but would be put to his election. Suppose he were to declare as on a guarantee, and the defendant pleaded non assumpsit, it is true that the judge might amend at the trial, *Hanbury v. Ella* (a), if the case should turn out to amount to goods sold and delivered; but if the defendant were to plead that there was no guarantee in writing, and then the plaintiff were to reply that there was, setting it out, whereupon the defendant were to demur for the insufficiency of the agreement so set out, and judgment was given for the defendant, the power of amendment would be out of the question. In *Jenkins v. Treloar* (b), the declaration contained one count claiming fees in the name of metage on coals imported into Truro, and another count claiming the same fees in the name of portage, and it was contended that the two counts ought to be allowed, as the judge at nisi prius could not amend a port duty into a metage; but the Court thought, under the New Rules two such counts could not be allowed. So in *Bastard v. Smith* (c), two counts describing a custom in different ways

(a) 1 A. & E. 61; S. C. 3 N. & M. 438. (c) 5 A. & E. 397; S. C. 1 N. & P. 242.

(b) 1 M. & W. 16.

1838.

EVANS
v.
DAVIES
and
LUCAS.

1838.

 EVANS
 v.
 DAVIES
 and
 LUCAS.

were not allowed, and *Cholmondeley v. Payne (u)* is to the same effect. [*Patteson J.* What is there to prevent a servant from having authority from both parties; *Mr. Watt* may give all the authority he possesses, and the bailiff may also have authority from the Crown.] The avowries allege seisin in fee in different parties, which is impossible. [*Patteson J.* Your argument shews that you cannot plead soil and freehold in A., and soil and freehold in B., but I have allowed it again and again, and so in replevin I have allowed avowries for rent due to A., and rent due to B.]

Sir *J. Campbell A. G.* (with whom was *R. V. Richards*), contra, cited *Leuckhart v. Cooper (b)*, but the Court stopped him, with an intimation that they would hear him on the point, if, on communication with the other judges, they thought it necessary.

Cur. adv. vult.

LORD DENMAN C.J. on this day said, we think that the two avowries and cognizances must be allowed in this case.

(a) 3 Bing. N. C. 708.

(b) 3 Dowl. P. C. 413.

Saturday,
 June 2nd.

THE QUEEN v. GOODBURN.

Quere, where the exact sum due to a pawnbroker for interest, would involve a fractional part of a farthing, is he entitled to the farthing?

Where the sum payable to a pawnbroker for interest on a loan for a month, at the rate of 20 per cent. would be three farthings and one-fifth of a farthing, even if he is entitled to receive 1d. for a single month, on account of the necessity of the case, he is not therefore, on a loan for a longer period, entitled to treat the contract as a monthly contract, and to receive at the rate of 1d. a month for such period, when there would be no longer any difficulty in paying him at the exact rate of 20 per cent.

THE defendant, in March, 1837, had been convicted before a justice of the peace, for that he the said *William Goodburn*, on the 16th of February last, at the parish of &c., then and there keeping a shop, and therein using and exercising the trade and business of a pawnbroker, did then and there, in his shop there situate, unlawfully demand, receive, and take of and from one *Daniel Byrne*, (the said

Daniel Byrne then and there applying and offering to redeem and redeeming a certain pawn and pledge, that is to say, two table-cloths,) the sum of $11\frac{1}{2}d.$ as and for and by way of interest and profit, over and above the principal sum of $4s.$, which had been lent and advanced by the said *William Goodburn*, on the 4th day of March, 1836, by way of pawn and pledge upon the said two table-cloths; the said sum of $11\frac{1}{2}d.$ so demanded, received, and taken as aforesaid, being a greater sum, to wit, the sum of $2\frac{1}{4}d.$ greater than he the said *William Goodburn* was then and there entitled to and ought to have demanded, received, and taken as aforesaid, and being contrary to the form of the statute in that case made and provided; and for which said offence the said justice adjudged the said *William Goodburn* to pay and forfeit the sum of $40s.$, and also the sum of $5s.$ for the costs and charges of prosecuting him to conviction for the same.

On appeal to the Middlesex Sessions, the conviction was affirmed, and a rule nisi for quashing the order of sessions having been obtained in Michaelmas term last,

C. Jones now shewed cause.--The Pawnbrokers' Act, the 39 & 40 Geo. 3, c. 99, s. 2, allows $\frac{1}{4}d.$ a month to be taken by way of interest for the loan of $2s. 6d.$, and $1d.$ for a loan of $5s.$ for the same period, that is at the rate of $\frac{1}{4}d.$ for $1s. 3d.$ The loan in this case was of an intermediate sum, namely, $4s.$, and the exact interest payable on it, for one month, at the rate above mentioned, would be $\frac{2}{3}d.$ and the fifth of a farthing. The pawnbroker could not take the full interest due to him for one month only, without taking something more; he could not take less than $1d.$ But the interest in this case was payable for eleven months and a half, and the necessity for taking more than he was entitled to, in order to have as much, no longer existed, as the sum payable to him for interest, according to the legal rate of $\frac{2}{3}d.$ and the fifth of a farthing for a month, would be $9\frac{1}{2}d.$, whereas he has taken $11\frac{1}{2}d.$, namely, at the rate of

1838.

 The QUEEN
 v.
 GOODBURN.

1838.


The QUEEN
v.
GOODBURN.

1*d.* a month. The conviction, therefore, is good; he was entitled by s. 3, to interest at the rate of 4*d.* a month for 20*s.*, and he has taken 5*d.*

Sir *W. W. Follett* and *Adolphus*, *contra*.—The question is, whether the interest is to be reckoned from month to month, or on the entire period. The language of the act seems to contemplate a monthly contract; and if the contract be by the month, the defendant having *ex necessitate* a right to 1*d.* for the first month, had the same right for each succeeding month, and 11½*d.* would be payable to him at the end of eleven months and a half. The second section allows a ½*d.* to be taken, where 2*s.* 6*d.* has been lent, “for any time during which the said pledge shall remain in pawn, *not exceeding one calendar month* ;” so that, if it were not for the 5th section, which allows interest to be taken for a part of the month, interest would be payable for two months on a pledge kept a day over the first month. By the 5th section, if a pledge is redeemed seven days after the first month, only a month’s interest is payable; if less than fourteen days after it, interest for a month and a half is payable; and if after the fourteen days, then interest is payable for two whole months. Thus it will seem that all the provisions of the act have reference to a month as the period contracted for. [*Jones*. The 19th section speaks of a year.] It does, and allows three “months” further beyond the year for redemption. The pawnbroker has a right to his full profit before delivering the pledge, and he cannot receive his full profit for a month without receiving something more. If the contract is by the month, any facility of calculation or of payment for a longer period is immaterial. It is a matter of contract, not of calculation, and may be likened to the rests in a mercantile account.

Cur. adv. vult.

Lord DENMAN C. J., on the following Tuesday, delivered

the judgment of the Court.—This was an appeal against a conviction of defendant, a pawnbroker, for taking interest at a higher rate than 4*d.* on 20*s.* for a month, or 20 per cent. per annum. He had, in fact, taken 11½*d.* on 4*s.* for eleven months and odd days, which is about 2*d.* more than at the rate aforesaid. But an ingenious argument was raised on the defendant's behalf, that the act considers the sum lent as advanced by the month; that if the 4*s.* had been repaid at the end of the first month, the 20 per cent. would be ¾*d.* and one-fifth, which sum defendant could not have received, as there are no fifths of a farthing, so that he must have either received a penny, or lost a portion of his 20 per cent.; that the act requires a similar mode of paying for every succeeding month; that, therefore, 1*d.* for each month must have been paid; and that, adding all these for the eleven months and upwards, the amount actually received by the defendant is warranted by the act.

But supposing this argument to be valid, if the loan were repaid while the interest is less than a farthing, from the necessity of the case, inasmuch as it must otherwise be less than 20 per cent. (which I am by no means prepared to admit, the words being so much "and no more,") still as soon as that period arrived when the interest so calculated amounted to a current coin, that necessity is at an end. Nothing prescribes that rests must be made monthly, the effect of which, in the present case, would entitle the pawnbroker to near 25 per cent. We think, therefore, that the sessions did right in affirming the conviction, and the rule for setting it aside must be discharged.

Rule discharged.

1838.

 The QUEEN
 v.
 GOODBURN.



Saturday,
June 2d.

G. MARTIN and Wife v. The QUEEN.

An indictment for obtaining goods by false pretences must state to whom the goods belonged, and if it do not, it will not be cured by verdict, under 7 Geo. 4, c. 64, s. 21.

ERROR on a judgment at the last Epiphany Sessions for the parts of Kesteven, in the county of Lincoln, upon an indictment, which stated that *G. M.*, late of &c., and *Elizabeth* his wife, contriving and intending &c. to cheat and defraud one *W. J. Holt* of his goods and merchandizes, on &c., unlawfully did falsely pretend to one *G. S.*, then and there being an apprentice to the said *W. J. Holt*, that the said *G. M.* was a housekeeper at Little Gonerby, and had opened a shop there, and wanted to purchase candles and starch in order to sell the same again by retail, whereas in truth and in fact the said *G. M.* was not &c. And that the said *G. M.* and *Elizabeth* his wife, by the false pretences aforesaid, did then and there unlawfully &c. obtain from the said *W. J. Holt* divers goods and chattels, to wit, &c., with intent then and there to cheat and defraud the said *W. J. Holt* of the same; concluding, *contra formam statuti*. The plaintiffs in error had pleaded not guilty, and been convicted. Joinder in error.

Curwood for the plaintiffs in error. The objection to the indictment is, that it does not state to whom the goods in question belonged; it states merely that goods were obtained by false pretences. The 7 & 8 Geo. 4, c. 29, s. 53, on which this indictment is framed, enacts, that if on the trial it appear that the goods have been obtained in such a manner as to amount to larceny, that the defendant shall not be therefore acquitted of the misdemeanor; and that no person tried for the misdemeanor shall be liable to be prosecuted afterwards for larceny upon the same facts. The goods ought to have been laid to be the property of some person, otherwise it would be impossible to plead an acquittal or conviction on this indictment in bar to a prosecution for larceny; *Reg. v. Norton (a)*. [Lord Denman C. J.

(a) 8 C. & P. 196.

Why could not the defendants aver that the goods in the two indictments were the same?] Too great an onus would be thrown on the prisoner, if he had also to prove such an averment; it should be enough for him to produce the two indictments, and the prosecutor would then have to prove that the offences were different. [Lord Denman C. J. What authority is there for saying that the collation of the two indictments would afford *prima facie* evidence?] *Rex v. Parry and others* (a). [Patteson J. Suppose the offences in the two indictments were laid on different days, the prisoner would still have to make the same averment in his plea of *autrefois acquit*; on whom would the onus of proof lie?] On the prosecutor, after the indictment had been put in, because time is immaterial. It is true that the present indictment follows the language of the statute, and that a prior statute, the 7 Geo. 4, c. 64, s. 21, enacts, that where the offence charged has been created by any statute, the indictment, after verdict, shall be held sufficient if it follow the words of the statute. But the omission in this case is of an essential particular, and is not helped by verdict.

Archbold for the crown. The indictment in the present case follows the words of the statute. [Littledale J. The statute uses the general word "goods," yet surely you would have to specify the goods.] It is the 20th section of 7 Geo. 4, c. 64, which cures technical defects; but the 21st section is now relied upon, which relates to matters of substance. [Lord Denman C. J. Would an indictment for burglary or larceny be sufficient, which did not allege to whom the dwelling-house or goods belonged?] Those are common law offences, but any offences created or defined by statute may be alleged in the indictment according to the words of such statute. [Littledale J. Under sect. 22 of the 7 & 8 Geo. 4, c. 29, would it be enough to allege that defendant destroyed a will, without saying whose will?] In

(a) † C. & P. 836.

1838.

MARTIN
and Wife
v.
The QUEEN.

1838.

MARTIN
and Wife
v.
The QUEEN.

Rex v. M'Gregor (a) it was held, that an indictment on 39 Geo. 3, c. 85, for embezzling, must state to whom the property belonged, but that decision was before the statute now relied upon to cure this omission. The omission to state whose goods the defendants have obtained by fraud would create no embarrassment to them in pleading *autrefois acquit*. *Hawkins* observes, "I take it to be clear that if the nature of the crime be in substance the same, a variance may generally be helped by proper averments (b)."

Curwood in reply. The distinction taken between statutable and common law offences does not make against the prisoners, for the offence of which they have been convicted may be pleaded in bar to an indictment for larceny, and therefore should have been described as at common law.

Lord DENMAN C. J.—I am clearly of opinion that this indictment is bad; it is quite consistent with it that the goods in question belonged to the prisoners. And although they may have obtained their own goods under such circumstances as to constitute the offence of which they have been convicted, yet *prima facie* the taking of a party's own goods is lawful, and the circumstances should be shewn which make it otherwise. Is the defect then cured by 7 Geo. 4, c. 64, s. 21, which provides, that "where the offence charged has been created by any statute, or subjected to a greater degree of punishment &c., the indictment or information shall after verdict be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute?" But some offence must be described, it is not sufficient to use the mere words of the statute, without describing any offence whatever. It is a common principle of law, that every criminal charge shall be made with convenient precision and certainty. In this case

(a) *Russ. & Ry.* 23.

(b) *P. C.* book 2, ch. 35. "Of the plea of *autrefois acquit*."

not only is the offence not described with convenient certainty, but no offence is described at all. Several offences are provided for by the 7 & 8 *Geo.* 4, c. 29, in such a way that the mere words of the statute do not describe any offence whatever. Thus sect. 22 makes it a misdemeanor to destroy or conceal any will; and sect. 33 makes it an offence to kill any house dove, and nothing is said about the ownership of such will or house dove, although of course a person may destroy his own will or house dove at pleasure. Such general language, if copied in an indictment, would be insufficient, and we must not construe the prior statute of the 7 *Geo.* 4, c. 64, s. 21, in such a manner as to make that an offence after verdict which may have been no offence at all.

1838.

 MARTIN
 and Wife
 v.
 The QUEEN.

LITLEDALE J.—I have no doubt that after judgment by default this indictment would be bad. The only question is, whether it is cured by verdict under the 7 *Geo.* 4, the offence having been described in the words of the subsequent statute. However the 7 *Geo.* 4 may cure an indictment of this kind, so far as the description of the offence itself is concerned, I am of opinion that the goods which are the subject-matter of the offence must be described with convenient certainty, as at common law.

PATTESON J.—I entirely agree that this indictment is bad, and that it is not cured by verdict. It is true that the section of the act describing this offence says, if “any person” shall by “any false pretences” obtain “any chattel” &c.; yet the “any” person must be named, the “false pretences” particularized, and so must the “chattel,” by stating what it was and to whom it belonged; it is not enough to say generally, that a chattel was obtained with intent to defraud a person, although his name is mentioned.

WILLIAMS J. concurred.

Judgment for the plaintiffs in error.

1838.

Saturday,
June 2nd.

The QUEEN v. The Marquis of SALISBURY.

1. The owner of a bridge resting on piles driven into the soil, one end of which was in the parish of A., and the other in the parish of B., in which parish was situated the toll-house, is rateable for an occupation of land in A. pro rata, although the road over the bridge was repaired by other persons.

2. Where tolls traverse of a bridge were let at a yearly rent, but not by deed:—Held, that no interest passed, and that the owner of the bridge was rateable in respect of his beneficial occupation thereof.

3. Where the crown granted to S. the castle and honor of H., and “all that toll and all those tolls called ‘traverse,’ to be taken in manner accustomed, i. e. of all saleable things passing through the town of H. and also through the towns of Ware, B., T., and elsewhere, in divers places in the same county;” and it appeared that a toll had always been taken at Ware Bridge, and that in various ancient documents it had been described as the traverse and the toll traverse of the bridge of W., and that S. and his ancestors, for twenty years past, had repaired the bridge:—Held, that the burden was cast upon S. to shew that the toll was a toll thorough, and not traverse, although the bridge was a public highway; and that the sessions, in the absence of any such evidence, were warranted in inferring that it was a toll traverse.

ON an appeal against a rate for the relief of the poor of the parish of Ware, wherein the Marquis of *Salisbury* was rated as the owner and occupier of Ware Bridge, the Hertfordshire Quarter Sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

Ware Bridge, the property rated, is situated on the highway of the great north road, across the navigable river Lea, connecting the town of Ware with a street partly in the parish of Ware, and partly in the parish of Great Amwell, and is itself in the several parishes of Ware and Great Amwell. It is a wooden and very ancient structure, resting upon piles driven into the soil of the bottom of the river, and on abutments of brick work on the bank on either side. Attached to the bridge, and resting on piles driven also into the bed of the river, is a stand or house used by the person who collects the tolls hereinafter described. Such stand or house is in the parish of Great Amwell. The occasional repairs necessary to the woodwork and frame of the bridge have, during the last twenty years, been executed by the orders and at the costs of the present Marquis of *Salisbury* and his father, the late Marquis; amongst which have been excavations of the soil in the bed and banks of the river, for the purpose of driving piles and strengthening the abutments and land-ties. The planking of the carriage-way has in the same manner been repaired by the order of the Marquis of *Salisbury* and his

late father; but the road itself has never been repaired by either of them. The tolls before mentioned are regulated according to a fixed scale set out in the deeds relating to them, hereafter mentioned. They are collected by *James Kent* (who resides in the toll house) on behalf of *Robert Everett*, who, by a parol agreement with the Marquis of *Salisbury*, has contracted for the receipt of these and certain other tolls for one year, from 1st April, 1835, at the rent of 261*l.*; one-twelfth part of which was paid at the time of the contract, and the residue of that sum was secured to be paid to the said Marquis of *Salisbury*, by equal monthly instalments of 19*l.* 18*s.* 9*d.*, by a warrant of attorney duly executed by the said *Robert Everett* and two sureties; but no grant or demise of the tolls had been made or executed to *Robert Everett*. Lord *Salisbury* is entitled to the tolls under a grant of 6 *Car.* 1. They are of very ancient origin, and the following evidence of their nature was produced at the hearing of the appeal.

1. 17 *Edw.* 2. } An inquisition, taken at &c., before the
Hertford. } escheator, on &c., upon the oath of
&c., who say that *Aymore de Valence*, late Earl of *Pembroke*, was seised in his demesne as of fee, on the day of his decease, of the castle and town of Hertford, with appurtenances, in the county of Hertford. [The inquisition, after stating certain rents &c., proceeded as follows:] Also they say that the tolls of the market and the traverse within the borough of Hertford, together with the tolls of the fair there, is worth by the year 30*s.* by estimation. Also the traverse at the bridge of Ware and at the bridge of Thele, pertaining to the said borough of Hertford, with the flow of the water from the town of Waltham Cross as far as to the town of Hertford, is worth by the year 8*l.* Also they say that the traverse of Hatfield, pertaining to the said borough, is worth by the year 20*s.* And they say the aforesaid Earl held the aforesaid castle and town of Hertford, with the manors of Essenden and Bayford pertaining, and other their appurtenances, of the gift of the now lord the king, by what service they know not.

1838.

The QUEEN
v.
Marquis of
SALISBURY.

1838.

The QUEEN
v.Marquis of
SALISBURY.

2. E registro Duc. Lanc. } To the tenants of Hertford.
temp. *Hen. 5*, fol. xlix. } *Henry &c.*, to all to whom
&c. greeting. Know ye that we, considering the poverty
of our tenants of our town of Hertford and others dwelling
in the same town, of our especial grace have pardoned and
released unto our said tenants and the other inhabitants all
manner of toll to us pertaining of and for all kinds of mer-
chandise which shall be bought at the fairs, markets, &c. in
the town aforesaid, for the term of ten years next to come,
saving always as to the custom to us due of and for all
kinds of merchandise which shall pass over the water of
Lea by the town above said, in the same manner as we
have at the bridge of Ware.

3. The counties of } The accounts of all and singular
Hertford, Mid- } the Ministers of the King's Ma-
dlessex, Surrey. } jesty then accountable, from the
feast of St. Michael the Archangel, in the 35th *Hen. 8*,
unto the same feast in the 36th year of his said majesty's
reign, (that is to say) for one whole year, as follows: —

The Farm of the Toll or Pas- } For 27*l.* lately received
sage of the Bridge of Ware. } from the issues of the
toll traverse of the bridge of Ware, so lately approved by
the collector of customs and tolls daily, weekly and quar-
terly, he does not answer here, because the profit thereof is
demised unto *William Graver* by indenture, and is charged
below under the sum of 34*l.*, as parcel of his farm. Nei-
ther does he answer for 3*l.* from the issues of the toll of
the bridge of Stanstead, otherwise called Thele, for the
same cause. Neither does he answer for 4*l.*, lately received
from the issues of the toll of the bridge of Hertford, with
the farm of the fishery of the demeane water; but he does
answer for 34*l.* from the farm of the toll, otherwise called
the traverse and custom, of the castle and honor of Hert-
ford, parcel of the Duchy of Lancaster, to be taken in the
accustomed manner, (that is to say) of and for all things
vending, passing, as well by the town of Hertford as by the

town of Ware, Bishop's Hatfield, Stanstead, otherwise Thele, or elsewhere, in divers places in the county of Hertford. [Here followed an enumeration of the different tolls.]

1838.

 The QUEEN
 v.
 Marquis of
 SALISBURY.

Duchy of Lancaster.

4. E. bund. Certificates and Depositions, 33 *Eliz.*—
 A commission to divers officers of the Duchy Court of Lancaster, indorsed, "A commission to inquire of toll over Ware Bridge, &c., in the countie of Hertford, (33 *Eliz.*)" reciting that by reason of the number of barges upon the river Lea, lately made navigable by act of parliament, the carriages of which were of late made by carts and on horses' backs over the bridges of Ware or Hertford, and Stanstead, which paid toll at the said bridges, the tolls were greatly decayed; and it required the commissioners to ascertain the truth of the premises, and whether any toll was due in respect of the barges.

5. The return to the above commission stated that "the towle of the said bridges is decayed within these tenne yeres past, to the yerely value of 16*l.* at least, by reason of the number of barges greatly increasing on the river of Lee, to which ryver there now belongeth above thirty barges; which, one weeke with another, do carry above 1000 quarters of corne, and that her majestie never had any towle, rent or dutie, paid by any bargeman for or in respect of any carriage by water. Moreover, wee do finde by divers circumstances and due examinacion, that the towle of the said three bridges is not now worth to be letten to any tennant or farmer whatsoever above 40 marks by the yere."

6. 1 *Car.* 1 to 2 *Car.* 1. The accounts of the Ministers of the lord the King of his Duchy of Lancaster:—

The Farm of the Toll } And he answers for 16*l.* from the
 of the Bridges. } farm of the toll travers and cus-
 toms of the lordship, castle and honor of Hertford, of all
 things for sale passing over the bridges of Hertford, Ware,

1838.

The QUEEN
v.
Marquis of
SALISBURY.

Hatfield, Stansfield, and elsewhere, in divers places in the countie of Hertford, so demised unto *Nathaniel West* for a term of years, &c. &c.

7. Similar Ministers' accounts for the 6 and 7 *Car.* 1, were put in, wherein *William*, Earl of *Salisbury*, answers them for 49*l.* 2*s.* 5*d.* from the fee farms granted to the aforesaid earl by letters-patent of his said majesty.

8. Letters-patent, dated the 6th *Car.* 1, which, after reciting an indenture of 17 *Jac.* 1, made between the said *James* 1, of the one part, and Sir *Henry Hobart*, Bart., and others, of the other part, whereby the said *James* did, of his special grace, certain knowledge and mere motion, and at the request and nomination of his then present majesty King *Charles*, being then Prince of *Wales*, &c. &c., and for his sole use and benefit, lease, grant, and to farm let to the said Sir *Henry Hobart* and others, all those the honor, castle, lordship, manor, town, grange, farms, rents, revenues, lands, tenements, and hereditaments, of Hertford, whether called Hertford, or lying, growing and being in Hertford, with their rights, members and appurtenances, in the said county of Hertford, being part of the lands belonging to the ancient Duchy of Lancaster, for the term of ninety-nine years; and that the said lessees, by an indenture of 20th September, 3 *Car.* 1, by his said majesty's licence, did assign to *C. Kighly* and *J. Southworth* all that the castle and manor of Hertford, with all their rights, members and appurtenances, and all that fishery, &c., and all that meadow, &c., and all those tolls, otherwise called traverse and customs, of the lordship, castle, and manor of Hertford, parcel of the Duchy of Lancaster, to be taken and received as theretofore had been accustomed, that is to say, (specifying the tolls,) for the residue of the said term of ninety-nine years; it was, by these now recited letters-patent, made known that his said majesty did confirm this last-mentioned indenture, and in consideration of 292*l.* 16*s.* 8*d.*, paid by *William*, Earl of *Salisbury*, did grant to the said Earl, his heirs and assigns, for ever, his majesty's reversion of the aforesaid manor and castle of

Hertford; [then followed an enumeration of the parcels;]
 “and also all that toll and all those tolls, called traverse and customs of the lordship and honor of Hertford, in the said county of Hertford, to be taken in manner accustomed, (that is to say) of all saleable things passing through the town of Hertford, and also through the towns of Ware, Bishop’s Hatfield, Thele, otherwise Therle, Belbar, and elsewhere, in divers places in the said county, (that is to say) for every cart carrying or laden with wool, flax, corn, leather, wine, or other wares and saleable things, passing over the bridges aforesaid or elsewhere, in divers places above mentioned, two pence; for every horse carrying saleable things, whose pack is tied under the horse’s belly, one penny, and if the load be not tied, one halfpenny, except a horse carrying corn, for which is to be taken, to wit, one farthing: and also for every man carrying wares or saleable things on his back, whose pack exceeds the value of four pence sterling, passing over the bridges aforesaid, or elsewhere as aforesaid, one farthing: Then or there late in the tenure or occupation of *Nathaniel Weston*, gentleman, or his assigns, as by the particular thereof mentioned to be the yearly rent or value of 16*l*.”

The castle of Hertford belongs to the present Marquis of *Salisbury*. It is the practice to charge all waggons and carts, laden with merchandize, passing over the bridge, with the toll; but if they pass through the town, and not over the bridge, no toll is demanded.

Thesiger, Dowling and Calvert, in support of the order of sessions (*a*). I. There can be no doubt that a bridge, having its foundation fixed in the soil, is a rateable tenement: *Rex v. Londonthorpe* (*b*), *Rex v. Otley, Suffolk* (*c*). In those cases a wooden windmill, resting on, but not fixed in, a brick foundation, was held not rateable, because not affixed or annexed to the soil.

1838.
 The QUEEN
 v.
 Marquis of
 SALISBURY.

First point:
 A bridge,
 having its
 foundation in
 the soil, is
 rateable.

(*a*) Jan. 17, before Lord Den-
 man C. J., *Littledale, Williams*,
 and *Coleridge, Js.*

(*b*) 6 T. R. 377.

(*c*) 1 B. & Ad. 161.

1838.

The QUEEN
v.Marquis of
SALISBURY.Second point:
The receipt of
tolls traverse
is a beneficial
occupation.Third point:
Lord S. seised
of Ware
Bridge.

II. The receipt of tolls by Lord *Salisbury* not being for the exercise of any public duty, as in *Rex v. The Inhabitants of Liverpool* (a), but for his private benefit, clearly makes him rateable as a beneficial occupier; *Rex v. The Beverley Gas Light Company* (b). In the words of Lord *Ellenborough* C.J., in *Rex v. Terrott* (c), he has a beneficial occupation or emolument resulting from the tolls in a personal and private respect.

III. The main question is, whether Lord *Salisbury* is owner of the bridge, or of the tolls only; for it is conceded that tolls *per se* are not rateable. But the tolls are evidently a toll traverse, which *ex vi termini* implies an ownership in the soil (d). They are described as a "toll traverse" throughout all the documentary evidence. The inquisition on the death of *Aymar de Valence* calls them "the traverse at the bridge of Ware." The ministers' accounts, 35 *Hen.* 8, and of 2 *Car.* 1, call them expressly "toll traverse:" and in the letters-patent of 2 *Car.* 2, reciting the grant of the honor and castle of Hertford by *Jac.* 1, they are described as "all those tolls called traverse." The grant of *Jac.* 1, being "*ex certâ scientiâ et mero motu*," is to be taken more strongly against the crown, and beneficially for the subject; *Com. Dig.* Grant (G 12); and this can only be effected by construing the tolls to be traverse, and not a thorough toll. If then the toll be toll traverse, the bridge must be vested in Lord *Salisbury*, and not the tolls only, for toll traverse accrues by reason of the ownership of the soil. Many circumstances shew that the bridge is so vested. The words of the letters-patent of *Car.* 1 are sufficient to pass the bridge; for although the bridge *eo nomine* is not conveyed, yet there is a special grant of the only source of profit accruing from the bridge, viz. the toll traverse. The repairs done for the last twenty years shew acts of ownership that would be sufficient evidence to maintain

(a) 7 B. & C. 61; S.C. 9 D. &
R. 780.

(b) 1 N. & P. 646.

(c) 3 East, 506.

(d) See 20 Vin. Abr. Toll.

trespass. If the repairs were done by the lords of *Salisbury* merely as owners of the toll, the onus is on them to shew that fact. Even if their possession were a wrongful one, still, having endured for twenty years, it would be sufficient until it were determined, and even against the Crown, unless a writ of intrusion were brought.

IV. As to the interest in the tolls not being in Lord *Salisbury*, it is clear that he could pass no interest in them to the lessee by parol; *Bird v. Higginson* (a), *Gardiner v. Williamson* (b). *Rex v. Snowden* (c) was cited at the sessions to shew that Lord *Salisbury* was not rateable; but that case is beside the question.

Lastly, it is clear that Lord *Salisbury* may be rated without being an inhabitant; *Rex v. Barnes* (d).

Platt and *E. F. Moore*, *contra*. The case does not find that Lord *Salisbury* is the occupier of the bridge: if any one is the occupier, it is *Everett*. An interest in a house may pass by parol; and the toll-house was in fact occupied by him. The tolls are called a "toll traverse," but they are in fact a toll thorough, to be taken of all persons passing through the town of Hertford. In the words of the original grant, it is payable by all "transeuntibus per villam de Hertford, Ware," &c.; and the number of places specified shew that it was toll from travellers on the public highway that was intended. The words "transversum pontis de Ware," which is the mode of describing the toll in the ancient grants, as appears by an inquisition of 5 *Edw.* 3, set out in *Chauncy's* Hertfordshire, 238, do not mean toll traverse, as now used, but a toll for passage only. *Tomline's* Law Dict. defines *traversum*, a ferry. There is no ground therefore for contending that this toll is a toll traverse. If *Charles* 1st had intended to grant Ware Bridge, he would have expressed it in terms; and the grant must be construed

1838.

The QUEEN
v.
Marquis of
SALISBURY.

Fourth point:
No interest in
tolls can pass
by parol.

Fifth point:
The owner of
rateable prop-
erty may be
rated without
being an inha-
bitant.

Fourth point.

Third point.

(a) 4 N. & M. 505.

(b) 2 B. & Ad. 336.

(c) 1 N. & M. 459; S. C. 4 B. & Ad. 713.

(d) 1 B. & Ad. 113.

1838.

 The QUEEN
 v.
 Marquis of
 SALISBURY.

in favour of the Crown; 2 *Comm.* 347. The distinction between toll thorough and toll traverse is comparatively modern, and was first taken in 22 *Ass.* 58, which was cited in *Smith v. Shepherd* (a), and overruled as to the point that toll thorough cannot be claimed by prescription.

It is found that this bridge is a highway. Therefore even if originally the toll was toll traverse, it would become toll thorough, when the bridge became a highway; *Com. Dig. Toll*, (D a), Ib. (C). The toll taken by Lord *Salisbury* is a sort of pontage; *Jehu Webb's* case (b); and the repairs done by him are a good consideration for it. Nothing but the tolls passed under the grant to Lord *Salisbury*; for the bridge being land, could not pass as appurtenant to land. *Rex v. Snowdon* (c) therefore is distinctly in point, for that case shews that tolls are not rateable at all, even though there be a toll-house; for the toll-house may be pulled down, and still the tolls would be payable. *Brett v. Beales* (d) is an authority to shew that the repair of Ware Bridge is a good consideration for toll thorough at that place. The origin of the right to take tolls, which probably existed before the Conquest, appears to have arisen from its being considered a feudal incident to land. Thus Sir *H. Ellis* defines it as "the customary dues or rents paid to the lord of a manor for his profits of the fair or market, as well as a tribute or custom for passage" (e), citing *Bract.* 2, c. 24, s. 3. If this be the correct view, it is easy to conceive how the tolls might be granted without the land; and as Lord *Salisbury* maintains the bridge, they are supportable as a toll thorough.

Cur. adv. vult.

LORD DENMAN C.J. on this day delivered the judgment of the Court:—

(a) *Cro. Eliz.* 710; *S.C. Moor.* 574, reported differently. See per Lord *Tenterden* C.J. in *Brett v. Beales*, 10 B. & C. 511.

(b) 8 Rep. 46 a.

(c) 1 N. & M. 459; *S.C.* 4 B. & Ad. 713.

(d) *Moo. & Malk.* 426; 10 B. & C. 508.

(e) 1 *Introd. to Domesday*, 256.

This is an appeal against a poor-rate, to which Lord *Salisbury* is assessed as the occupier of land in the parish of Ware, and the land so occupied is described in the rate as Ware Bridge. It appears, from the facts stated, that Ware Bridge is partly in the parish of Ware, and partly in that of Great Amwell. It is a wooden structure, resting on piles driven into the bed of the river, and on abutments of brick work on the banks. Attached to the bridge, and resting on piles driven into the bed of the river, but in the parish of Great Amwell, is a stand or house occupied by the person who collects the bridge tolls. The repairs of the bridge for the last twenty years have been done by the late and present Marquis; and in doing them, excavations have been made in the soil of the bed and banks of the river for the purpose of driving piles, and strengthening the abutments and land-ties. The planking of the carriage-way has been in the same manner repaired by them from time to time, but not the road itself upon the bridge. The Marquis is the grantee from the Crown, in right of the Duchy of Lancaster, of the bridge tolls, in the manner more particularly described hereafter. Upon these facts, if there were nothing more in the case, there would be clearly quite enough to warrant the sessions in finding that there was an occupation of land in the parish of Ware by the Marquis, and an occupation beneficial in respect of the tolls. The actual perception of the tolls in the parish of Great Amwell alone would be immaterial, because the land in Ware would appear to contribute towards the earning them; and the case would seem to be almost identical with that of *Rex v. Barnes* (a): the difference that a road-way was placed upon the planking of the bridge and kept in repair by others than the Marquis, whereas in the case cited, the Bridge Company made and repaired the carriage-way as well as the bridge, could not be considered material, because it would not rebut the presumption of ownership and occupation of the bridge itself and the land on which it stands, arising

1838.

The QUEEN
v.
Marquis of
SALISBURY.

(a) 1 B. & Ad. 113.

1838.

The QUEEN
v.
Marquis of
SALISBURY.

from the facts before stated. Two circumstances however were relied on to relieve the Marquis from the present assessment; the first, that by reason of a demise another person was the occupier; the second, that the nature of the toll itself, and the title under which the Marquis held it, when examined into, shewed conclusively that he was not the owner of the bridge or land on which it stands, but that he had repaired the bridge only in respect of the tolls, granted to him. With regard to the former, the case states the tolls to be collected by *J. Kent*, who resides in the toll-house, on behalf of *Everett*, and that *Everett* receives them under a parol agreement with the Marquis for one year, at a yearly rent or sum to be paid by monthly instalments, secured by a warrant of attorney; and that the Marquis has executed no grant or demise of the tolls. Assuming then that the tolls are claimable in respect of the ownership of the land, there is no evidence here that the land *eo nomine* is professed to be demised at all; there is nothing to shew that at this moment the Marquis is not in the possession of the land for the purpose of doing the repairs, indeed for every purpose consistent with the bare collection of the tolls by *Everett*, at the toll-house. On the other hand, though there is an agreement for a demise of the tolls *eo nomine*, yet, as by their nature they can only pass by deed, no interest at law has passed out of the Marquis, who must therefore be still considered in possession of them; his intended tenant being in truth only his bailiff for the collection of them.

We pass to the consideration of the remaining point of the case. The question intended here to be raised is, whether the toll claimed by the Marquis be toll-traverse, or toll-thorough; in the former case, it would imply the ownership of the land, and then the repairs before mentioned would still be referable, as before they appeared to be to the ownership of the bridge and land; in the latter, no such inference would arise, and the repairs of the bridge would be explainable, as done in respect only of the toll, and as the necessary consideration to render the grant of it

valid. The sessions have not found all the facts from which we might draw the legal inference, but, in addition to some facts stated, have supplied us with a considerable portion of documentary evidence. This is not the proper mode of submitting a case for our consideration, and it must not be assumed, because we enter into the examination of these documents, that we will, upon all occasions, inquire into matters of fact properly cognizable by the sessions only.

From the documentary evidence it appears that the Marquis derives title to this toll under a grant from the Crown of the reversion expectant on a lease, of the honor, castle, lordship, manor, town, &c. of Hertford. Among the parcels of the grant specially set forth, are these, "all that toll and all those tolls called Traverse, and customs of the lordship and honor of Hertford, in the said county of Hertford, to be taken in manner accustomed; that is to say, of all saleable things passing through the town of Hertford, and also through the town of Ware, Bishop's Hatfield, Thele otherwise Therle, Belbar, and elsewhere in diverse places, in the said county; that is to say, for every cart &c." passing over the bridges aforesaid &c. The Marquis therefore takes this by the description of a toll called Traverse, and belonging to the lordship and honor of Hertford. This grant is of the date 6 *Car.* 1. We are also supplied with an inquisition after the death of *Aymar de Valence*, Earl of *Pembroke*, in which the toll is connected with the castle and town of Hertford, and called "the Traverse at the Bridge of Ware." A minister's account for Hertford of the 35 & 36 *Hen.* 8, describes it as "the Toll Traverse of the Bridge of Ware;" and in another account of the 1 & 2 *Car.* 1, the minister answers for 16*l.* from the farm "of the toll travers and customs of the lordship, castle, and honor of Hertford, of all things for sale passing over the bridges of Hertford, Ware," &c. It cannot be denied that this is strong evidence to shew that the toll in question is in its nature toll traverse; it raises a strong probability that Ware is a manor within the honor of Hertford, and that the Marquis is the owner of

1838.

The QUEEN
v.
Marquis of
SALISBURY.

1838.

The QUEEN
v.
Marquis of
SALISBURY.

the wastes in it: the soil therefore may well be in him, and that it is so, is consistent with the facts of repairs before stated. We think that, after this evidence, the burthen was cast upon the Marquis of meeting it by contrary evidence, and that in default of his doing so, the sessions were well warranted in considering it a toll traverse, and in confirming the rate upon him. The order of sessions therefore will be confirmed.

Order of Sessions confirmed.

Saturday,
June 2nd.

The QUEEN v. Lord GODOLPHIN and JOHN HAILSTONE,
Esq., Justices of the Peace for Cambridgeshire.

1. *Semble*, that a Friendly Society, whose rules had been originally inrolled, but which had adopted and acted on new rules for a number of years without having them inrolled, ceased to be within the protection of the 33 Geo. 3, c. 54.

2. The Court refused to issue a mandamus to justices to hear the complaint of a member of a Friendly Society, which had been acting on rules not inrolled for upwards of 30 years, on the doubt it entertained as to the existence of the society in such a case, although the original inrolled rules had never been repealed.

B. ANDREWS, in Hilary term, 1837, had obtained a rule, calling upon the defendants to shew cause why a writ of mandamus should not issue, directed to them, commanding them to issue their summons to the president and stewards of the Old Club Friendly Society in Cambridge, and to hear and determine the complaint of *Thomas Lupton* against the said society, for having expelled him from it.

By the affidavit of *Lupton*, on which the rule was obtained, it appeared that the society in question was established in 1775, and that in 1794 the rules of the society were inrolled with the clerk of the peace. These rules were acted upon from 1794 till 1804, when they were altered and reprinted. The members of the society directed an attorney's clerk to cause the amended rules to be inrolled with the clerk of the peace, and *Lupton* paid him money for so doing, and believed that they were inrolled. The amended rules were acted upon by the society up to the year 1835, in total ignorance of their never having been inrolled up to that time. Between 1804 and 1835, various applications had been made to magistrates to restore persons expelled by the society, and amongst others one by *John Massey*,

although the original inrolled rules had never been repealed.

the now president of the society, who was thereupon ordered to be readmitted. The affidavits then stated that *Lupton* became a member of the society in 1797, and then stated his expulsion from the society in September, 1836, his application to the county magistrates for an order to readmit him to the society, and the refusal of the magistrates, after hearing the other side, to make an order, on the ground that the rules of the society were not inrolled.

The affidavits in answer stated, that in the year 1804, other rules and articles, differing most materially and essentially from the first rules which were inrolled, were adopted by the society, with the full sanction of *Lupton*, the then president, which were acted upon up to 1820, when certain other rules were adopted and acted upon up to the present time. The affidavits then denied that during the twenty years in which the deponents had been members, the rules of 1794 had been acted upon, or their existence known to the deponents, or, as they believed, to any of the society, till the year 1834. The affidavits then stated the summons by the defendants to hear the complaint made by *Lupton*, and that at the hearing of the complaint before the defendants, and two other justices of the county of Cambridge, the information of *Lupton* was dismissed.

Kelly, with whom was *Gunning*, in Hilary term last (*a*), shewed cause. The 33 Geo. 3, c. 54, s. 2, only gives justices authority to interfere with a friendly society, and make such an order as is prayed for by the rule, where its rules are inrolled under that act. It appears by the affidavits that this society has been acting, since 1804, under rules which have not been inrolled. *Rex v. Gilkes* (*b*) shews that the inrolment of the rules is the only basis of the justices' jurisdiction; and in *Ex parte Norrish* (*c*), where a friendly society had departed from the rules which had been inrolled,

(*a*) Jan. 10th, before Lord Denman C. J., *Littledale, Williams and Coleridge Js.*

(*b*) 8 B. & C. 439; S. C. 2 Man. & R. 454.

(*c*) Jac. 162.

1838.

The QUEEN
v.
Lord
GODOLPHIN
and another.

1838.

 The QUEEN
 v.
 Lord
 GODOLPHIN
 and another.

the Master of the Rolls held that the society was dissolved. The present is a much stronger case, for the society has not only departed from the old rules, but has adopted a new set altogether. In *Rex v. The Witham Savings' Bank* (a), it was held distinctly, that the justices have no power to act where the rules are not inrolled. In fact, a society that has been governing itself for upwards of thirty years, on rules not inrolled, is a mere voluntary society, and it would be the height of injustice for a magistrate to make an order, with reference to rules which had been inrolled so long ago, and which were not the governing rules of the society. *Batley v. Townrow* (b) is a distinct authority that where new rules are adopted, but not inrolled, the fact of the old ones having been duly inrolled gives no legal existence to the society.

Gunning, on the same side, was stopped.

B. Andrews and *W. H. Watson*, contra. The rules of this society have been inrolled so as to give the justices jurisdiction, what then has occurred to oust that jurisdiction? Not the adoption of new rules, because section 3 of 35 Geo. 3, c. 54, enacts, that no rule once confirmed by the justices shall be altered, rescinded, or repealed, except in the manner therein provided, viz. by a meeting called for the purpose, and an inrolment at sessions. As this has not been done with respect to the new rules, it follows that the old rules stand unrepealed. By section 12, a friendly society cannot be dissolved, except by the consent of five-sixths of the society. These sections were not brought before the notice of the Court in *Ex parte Norrish* (c). [*Littledale J.* Do you contend that a friendly society, going on for thirty or forty years with new rules not inrolled, would be a legal society, because its rules had been once inrolled?] It is difficult to see how the jurisdiction of the justices can be

(a) 3 N. & M. 416.

(c) Jac. 162.

(b) 4 Camp. 5.

taken away where it has once accrued. [*Littledale J.* Suppose a complaint by a member who required a payment to be made to him, according to the old rules, which had not been acted upon?] If the application were for payment according to the new rules, of course it could not be attended to; but if it were on the inrolled rules, the magistrates might make an order as near the justice of the case as they could. This, however, is not an application for payment, but to be restored to the society. If the adoption of new rules has the effect of dissolving the society, then the society may do indirectly that which section 12 has enacted shall only be done in a certain mode. *Batley v. Townrow* (a) has been relied upon, but in that case, as well as in *Ex parte Norrish* (b), the judgment of the Court only goes to the extent of deciding that officers elected under rules not inrolled, have no *locus standi* in Court. The parties opposing this rule cannot contend that the society is dissolved, for it appears by the affidavits that they have themselves treated the society as a legally existing society, and have obtained the interposition of the justices in their own behalf. All that has been done here is to alter the rules of the society from time to time, and it does not at all appear that the new rules are inconsistent with those inrolled. If the Court will not grant the rule it will cause much inconvenience, as it will drive the parties into equity, where all the members of the society must be made parties to the suit; *Beaumont v. Meredith* (c). The argument on the other side goes to the extent that the slightest departure from the inrolled rules operates as a dissolution of the society. But this is to defeat the intention of the legislature, which was to give a legal existence to these societies, and by placing them under the jurisdiction of justices, to protect the different members from one another.

Cur. adv. vult (d).

(a) 4 Camp. 5.

(b) Jac. 162.

(c) 3 Ves. & Bea. 180.

(d) See the 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, by which the law relating to friendly societies is consolidated.

1838.

The QUEEN
v.
Lord
GODOLPHIN
and another.

1838.

The QUEEN
v.
Lord
GODOLPHIN
and another.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This was a rule for a mandamus to justices to issue a summons to the president &c. of a friendly society, and to hear and determine the complaint of *Thomas Lupton* against the society for having expelled him. The cause shewn was, that under the circumstances hereinafter stated, the friendly society in question was no longer within the provisions of the 33 *Geo. 3*, c. 54, and consequently that the magistrates had no jurisdiction. In answer to this it was amongst other things urged, that some of the members had recently declared that the society was still existing within and governed by the provisions of the act. We mention this in the first place to dispose of it at once, because we can attach no importance to the opinion or declarations of all or any portion of the members of this society, as to the legal character now to be attributed to it. In order to make the rule absolute, we must satisfy ourselves that the magistrates have jurisdiction to make a legal order in the matter, in which their interference is required; an order that may be enforced if resisted, and the enforcement of which will not expose the magistrates to the payment of damages.

It appears from the affidavits that the society was established in 1775; in 1794, their rules were duly inrolled, and continued to be acted upon until 1804. At that time new rules were made, in many respects essentially different from the former; these were intended to be inrolled, but in fact were not; they were however acted on till 1820, when further alterations were made, which, like the former, have never been inrolled. In both instances the omission to inrol appears to have been unintentional, and the misfortune rather than the fault of the society. The application to the magistrates is upon the footing that the rules inrolled in 1794, are still the governing rules of the society; in support of this, the third section of 33 *Geo. 3*, c. 54, is relied upon. That section enacts that no rule, once confirmed by the justices at sessions, shall be altered, rescinded, or repealed,

except in the manner there provided, and then proceeds thus : “ and *such* alteration or repeal shall be subject to the review of the justices, and shall be filed in the manner hereinbefore directed; and no *such* rule, order, &c. shall be binding, or *have any force or effect*, until the same shall have been agreed to and confirmed by such justices, and filed as aforesaid.” It is contended, therefore, upon these words, that as the new rules, by which the former inrolled rules were intended to be repealed, have never been confirmed or filed at sessions, they have no force or effect whatever, and it is thence inferred that the old rules are still in operation, and the society, in point of law, still governed by them, and so within the protection of the statute.

As far as respects the new rules, it appears to us that the argument is well founded; whether the inference drawn as to the present binding power of the old rules be correctly drawn, is the question. The section under consideration is manifestly framed to regulate the manner in which any society of this sort shall proceed in the formal repeal or alteration of a confirmed rule, specifying the notices and proportion of consenting members, which shall be necessary; and when, in compliance with these requisitions, an old rule shall have been altered or repealed by a new rule, it *further* and in addition provides that *such* new rule shall not be binding or have any effect until confirmed and filed at sessions. For any thing therefore intended to be affected by the new rules, it is enough to say, that for want of confirmation and filing they are at present inoperative; but as it must be taken upon these facts, that by common consent of the then existing members the old rules were abandoned in 1804, and have practically had no operation since; and further, as it must be presumed that in an interval of thirty-three years many of the then existing members must have died, and many new members must have been added, who have become so upon the faith that the new rules were the governing rules of the society, and who may have been in entire ignorance of the old rules; it is by no means a clear conse-

1838.


The QUEEN
v.
Lord
GODOLPHIN
and another.

1838.

The QUEEN
v.
Lord
GODOLPHIN
and another.

quence that the old rules can at this moment be resorted to, as in existence even for the purpose of holding the society together under the statute. If they are binding rules for that purpose, they are so for all purposes; they may, for any thing we know, provide different rates of contribution and relief from those now acted on, and may vary the rights of the members in other material points, and there would arise the gross injustice that members added since 1804 may find themselves now upon a totally different footing from that on which they understood themselves to stand, when they joined the society. The only decided case exactly in point which was cited, is *Ex parte Norrish* (a). That was an application made in 1821, to the Master of the Rolls, by petition, in order to a summary proceeding against a late trustee of a friendly society, under the 8th section of the statute (b); that mode of proceeding could only be adopted in case the society was existing under the statute; the same point therefore arose as here. The facts were, that the rules had been allowed and filed in 1813; soon after, some dissatisfaction with the conduct of the officers having arisen, a committee had been formed to regulate the affairs of the society, and from that time the rules had not been attended to, the meetings not held nor payments made, nor officers regularly appointed. The Master of the Rolls said, "It was a great misfortune to these societies, that they were in the habit of deviating from their rules; here, since 1813, they had ceased to act upon the rules that had been registered, and had proceeded on a different plan; what had been done since had been done by agreement, and not under the regulations. *They had become dissolved*, and the Court had no longer any jurisdiction under the act."

In that case, it is true the third section does not appear to have been noticed, and in the view which we have taken it was not applicable, because there had been no attempt by new rules formally to alter or repeal the old ones. The Master of the Rolls decides upon the effect of a practical

(a) Jac. 162.

(b) 33 Geo. 3, c. 54.

abandonment of the old rules, which is the difficulty that presses upon our minds in the way of issuing the mandamus prayed for.

We are aware of the extreme inconvenience of putting the claimant in the present case to seek his relief in a Court of Equity, but with the authority of *Ex parte Norrish* (a) before us, and the serious doubts (to say no more) which we entertain, whether the magistrates have the jurisdiction which the writ could command them to exercise, we should violate our well-established rules, if we were to make the rule absolute. And whatever may be the amount of inconvenience in the particular case, we perhaps do that which is more than proportionably convenient in general, if by discharging the rule we cause it to be generally understood that these societies cannot depart from their established rules, or neglect to comply with the statute, in the mode of altering or repealing them, without exposing their property to danger, and themselves to great expense, loss and inconvenience.

Rule discharged.

(a) Jac. 162.

JAMES v. ASKEW.

Saturday,
June 2d.

J. HENDERSON, in Michaelmas term, 1837, obtained a rule to shew cause why the defendant should not be allowed costs under the 43 Geo. 3, c. 46, s. 3. The affidavits on which the rule was obtained shewed that the plaintiff, on the trial between these parties, had recovered a much smaller sum than that for which the defendant was held to bail. The defendant, however, had not been actually arrested, but, a *capias ad respondendum* having been sued out, a sheriff's officer waited with a warrant on the defendant's attorney, and required the defendant to give bail to the sheriff. A bail-bond was accordingly executed, and special

If a defendant puts in special bail without being actually arrested, he is not entitled to costs under the 43 Geo. 3, c. 46, s. 3.

1838.
The QUEEN
v.
Lord
GODOLPHIN
and another.

1838.

JAMES
v.
ASKEW.

bail was afterwards perfected, without the defendant herself ever having seen the sheriff's officer.

Wightman and Crompton shewed cause.—The defendant was held to bail, but was not arrested, and the statute does not give costs, unless, in the words of the 3rd section, the defendant has been "*arrested and held to special bail.*" The first section, which is entirely remedial, enacts disjunctively that no person shall be "*arrested or held to special bail,*" unless for a debt of the requisite amount, exclusive of costs. But in the 3rd section, which imposes a penalty, the disjunctive is not used, so that the plaintiff is not liable, unless the defendant shall have been both arrested and held to bail. Thus the legislature has shewn that it used "*or,*" in the one case, and "*and,*" in the other advisedly. In *Bates v. Pilling* (a) it was expressly held, that there must be both an arrest and a holding to bail to bring a case within the statute. The defendant must at all events be arrested, even if it be not necessary that he should also be held to bail. In *Amor v. Blofield* (b), a bailable writ was sued out: the defendant was not actually arrested, and on account of a defect in the affidavit of debt, was allowed to file common bail, instead of perfecting special bail: he was held not entitled to costs. In *Preedy v. M'Farlane* (c), it was not necessary to decide the point, but the Court clearly intimated, in confirmation of *Bates v. Pilling* (a), that the defendant must have been subjected to both proceedings, in order to claim redress under the statute. From this last case it would seem that the going to prison after arrest would amount to a holding to bail, and dispense with the necessity of actually giving special bail, before obtaining costs. But no case indicates that actual arrest can be dispensed with, or that any other proceedings can be considered equivalent to it. Thus, Lord Abinger C. B. ob-

(a) 2 C. & M. 374; S. C. 2
Dowl. P. C. 367.

(b) 9 Bing. 91.

(c) 1 C. M. & R. 819.

serves in *Edwards v. Jones* (a), with reference to this very subject: "Where a party voluntarily gives special bail, he can in no sense be said to be arrested; but when he is arrested, he is taken into custody only *until* he gives special bail, so that in one sense he is *held* to special bail." *Parke* B. also inquires in the same case, "Does not the being actually arrested, and so brought under an obligation of putting in special bail, satisfy all that the statute intended?" The question, however, was not there determined; but the decision in *Bates v. Pilling* (b) is direct upon the point, and has never been questioned, except by a dictum of *Parke* B. in *Wilson v. Broughton* (c), in which case that learned judge seems to have thought that the holding to bail alone would satisfy the language of the statute.

Cresswell and *J. Henderson*, *contra*.—It is by no means certain that the facts in this case do not constitute an arrest, to which actual contact is not necessary; *Grainger v. Hill* (d). There seems to be no difference between that case and the present, except that here the defendant did not herself see the sheriff's officer. But, admitting that there was no arrest, *Bates v. Pilling* (b) is the only authority that arrest is essential to entitle the defendant to costs, and it appears to have been founded on *Berry v. Adamson* (e), which was not a decision upon the present subject, but upon the question whether the particular circumstances amounted to an arrest, so as to be the subject of an action on the case for maliciously arresting. According to the terms of the statute, if they are to be taken literally, a defendant who is arrested and goes to prison for want of bail, could not recover costs. This proposition will hardly be contended for, so that arrest at all events, without special bail, would suffice. If then the term of putting in special bail may be severed from the arrest for one purpose, why not for

1838.

JAMES
v.

ASKEW.

(a) 2 M. & W. 414.

(c) 2 Dowl. P. C. 631.

(b) 9 C. & M. 374; S.-C. 2
Dowl. P. C. 367.

(d) 4 Bing. N. C. 212.

(e) 6 B. & C. 528.

1838.

 JAMES
 v.
 ASKEW.

another, so that either the arrest alone, or the giving bail alone, will bring a case within the statute? A defendant, who has given bail, is restrained of his liberty, for in contemplation of law he is always in their custody, which is assumed in the writ of habeas corpus cum causâ. Or suppose the bail were to render the defendant the very day on which they had become his bail, upon the terms of the act rigidly construed he would be without remedy. Again, on the terms of the act, the defendant could not deposit money in the hands of the sheriff, in lieu of bail, unless there had been actual arrest. It is necessary, therefore, for the Court to construe the act liberally.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—In this case we were called upon to give the defendant costs, under the 43 Geo. 3. She had put in and perfected special bail, but had not been arrested. We are of opinion that costs should not be given under the statute, unless there has been, what may be called, an arrest.

Rule discharged.



MORGAN v. HALLEN and another, Executors of SARAH
 IRONMONGER.

Monday,
 June 4th.

Whether an apothecary is entitled to recover for attendances as well as medicines, is a question of mere fact for the jury, taking into consideration the distances

ASSUMPSIT for the work, labour, and attendance of the plaintiff, as a surgeon and apothecary, and for medicines found and provided. The defendants paid 124*l.* 10*s.* into Court, and pleaded *non damnificatus ultra*.

travelled, the number of attendances, the charge for medicines, and all the other circumstances of the case, from which a contract for reasonable compensation can be implied.

At the trial at the Stafford Summer assizes, 1836, before *Littledale J.*, it appeared that the plaintiff, who was an apothecary at Lichfield, had attended Mrs. *Ironmonger*,

who lived in the same town, for some years, and that at her death he sent in his bill to the executors, claiming, for medicines furnished from January, 1829, to May, 1835, 104*l.* 18*s.* 6*d.*; and "for extraordinary attendance and advice, frequently four or five times a day, during the above period, 110*l.* 10*s.* No evidence was given as to any surgical operations; but it was proved, that the attendances of the plaintiff had been given and the medicines furnished, during the period claimed. The contest at the trial was, whether the plaintiff was entitled, as an apothecary, to claim for attendance as well as medicines. It appeared that in a former bill, sent in by the plaintiff during Mrs. *Ironmonger's* life-time, extending over a period of nine years, he left a blank in his claim for "attendances," and Mrs. *Ironmonger* paid him 20*l.* on this account, when she settled the rest of the bill. The cases of *Tuson v. Batting* (a), and *Towne v. Lady Gresley* (b) were cited, and the learned judge reserved the point, whether an apothecary could claim for attendances as well as for medicines, and he left it for the jury to say, whether the sum paid into Court was a sufficient compensation for the medicines and attendance. The jury found a verdict for the plaintiff for the whole amount of his bill.

Sir *W. W. Follett*, in Michaelmas term, 1836, having obtained a rule nisi to enter a nonsuit according to leave reserved,

Talfourd Serjt., Macmahon, and R. V. Richards now shewed cause. There is no question of law in this case, for the jury have found that the plaintiff is entitled to the whole of his claim, as a reasonable compensation. There is a popular notion that an apothecary is not entitled to recover for attendances, as well as for medicines, but that cannot be law. *Best C. J.*, in *Towne v. Lady Gresley* (b), threw out some *dicta* to this effect, but his lordship pro-

1838.

 MORGAN
 v.
 HALLEN
 and another.

(a) 3 Esp. 193.

(b) 3 Carr. & Pay. 581.

1838.

 MORGAN
 v.
 HALLEN
 and another.

ceeded on a misapprehension that there was something in some acts of parliament on the subject, to prevent a recovery for attendances. But in *Gensham v. Germain* (a) an attempt to set aside an award, because the arbitrator had allowed an apothecary for attendances, was unsuccessful. And in a subsequent case of *Handey v. Henson* (b) Lord Tenterden C. J. held, that a surgeon and apothecary might recover compensation both for medicines and attendance. *Tuson v. Batting* (c) decided, that if a surgeon left a blank for his attendances, he could not recover more than the patient chose to pay. That case would probably receive a different decision at the present day, and at all events does not touch the present question. On principle, it is clear that an apothecary ought to be allowed to charge for both attendances and medicine. For if he is to be compensated by his charges for medicine only, he is induced to send in more than is necessary, and he will have to vary the price to each patient, according to the distance from his own residence, and the loss of time occupied by each attendance.

C. Phillips and *Busby*, contra. The principle on which an apothecary ought not to be allowed to charge both for attendances and medicines is this, that as apothecaries' charges for drugs are exorbitant; they are sufficiently compensated by that alone; or if they choose to charge for attendances, they ought not to charge for their drugs at apothecaries' prices. This case was treated as a matter of law at the trial, whereas it should have been put to the jury as a question of fact. *Tuson v. Batting* (c) is identical with the present case, with the single exception that the surgeon in that case left a blank charge for his attendances, as the plaintiff did in a former bill.

Lord DENMAN C. J.—I think there is no point of law

(a) 11 B. Moo. 1.

(c) 3 Esp. 192.

(b) 4 Carr. & Pay. 110.

in this case, but it is entirely a question of fact, whether any contract was made between the parties, or whether there were any facts from which a contract may be implied to pay a reasonable sum for attendances. These facts are for the jury to determine.

1838.

 MORGAN
 v.
 HALLEN
 and another.

LITLEDALE J.—I will not say that in point of law an apothecary has, in all cases, a right to charge both for drugs and attendances. But in some cases he certainly may. An apothecary may be called upon to administer drugs to a patient who resides at a great distance, for the attendance on whom the price of the medicine may afford hardly any compensation whatever, or he may find that the patient requires no medicine. In such cases it is evident that the apothecary is entitled to compensation for his work and labour. On the other hand, there are many cases where attendances ought not to be charged, namely, where there is but little distance to go to visit the patient, and sufficient medicine is administered to afford a reasonable compensation. All these cases resolve themselves into matters of fact for a jury.

PATTESON J.—I cannot conceive any case in which this question can be made a matter of law. In an action on an apothecary's bill for attendances, the first question is, whether there be an express contract, and if not, whether there are any facts from which the jury can imply this contract, and what is a reasonable compensation. In no case, therefore, is the intervention of the Court necessary.

WILLIAMS J.—I will only add, that the defendants themselves seem to have taken this view of the case, for they have paid money into Court generally, and more than sufficient to meet the charge for drugs, and therefore they left it to the jury to say whether sufficient had been paid or not for the attendances.

Rule discharged.



1838.

Monday,
June 4th.

The QUEEN v. The Inhabitants of MAWGAN IN
MENEAGE.

1. Where a road had been presented by a magistrate under 13 Geo. 3, c. 78, s. 24, and the presentment was removed into Q. B. by certiorari, after trial, but before judgment, that statute was repealed by the 5 & 6 Will. 4, c. 50, s. 1:—Held, that the Court could not give judgment for the Crown, as the proceedings were founded on the presentment, which was no longer valid.

2. *Quere*, whether, in a plea by the inhabitants of a parish indicted for the non-repair of a road, that A. B. is liable to repair *ratione clausure*, it is sufficient to aver that the inclosure was made whilst A. B. was in occupation of the adjoining lands.

PRESENTMENT of a highway situate in the parish of Mawgan in Meneage, made by *John Borlase*, esq. one of his Majesty's justices &c. at the general quarter sessions of the peace at Bodmin, on Tuesday the 1st July, 5 W. 4, by virtue of an act made in the 13 Geo. 3, for the amendment and preservation of the highways, upon his own view, that, &c. &c. The presentment having been removed into this Court in Michaelmas term, 5 W. 4, by certiorari, a particular was delivered under a judge's order, setting out the termini of the road out of repair.

Two of the inhabitants, for themselves and the rest of the inhabitants of Mawgan (except *Jane James*, *Henry Reed*, *J. R.* and *W. R.*) pleaded *onerari non*, because, 1st, as to parcel &c. containing 350 yards, the same adjoined a certain farm called &c., which said farm, at the time in the said presentment, and at the time of pleading, was in the occupation of *John Rogers*, and that the said *John Rogers* was liable *ratione tenuræ*.

2nd. As to other parcel containing 730 yards, they say that the same, from time whereof &c. until the inclosures thereof respectively hereinafter mentioned, was a certain common highway, upon and leading over a certain and uninclosed ground called Roskymer Downs, in the said parish; and as to 343 yards in length, or thereabouts, parcel of the said last-mentioned 730 yards, that the same adjoins on both sides to certain lands which, at the time in the said presentment mentioned, were in the occupation of one *Thomas James*, deceased, and were then in the occupation of one *Jane James*, widow of the said *T. J.*, and which said lands were theretofore, to wit, on the 1st January, 1830, parcel of the said piece of open and uninclosed ground; and that afterwards, and before the time in the said presentment mentioned, to wit, on the 1st February, 1830, the said 343

yards in length of the said highway were inclosed on both sides thereof, by fences erected and made in and upon the said last-mentioned lands, now in the occupation of the said *Jane James*, and continually from that time remained so inclosed as aforesaid; and that the said *Thomas James*, so being in the occupation of the said last-mentioned lands at the time in the said presentment mentioned, by reason of the continuance of the inclosure of the said 343 yards in length of the said highway as aforesaid, ought to have repaired and amended, and by reason thereof the said *Jane James* still ought to repair and amend, throughout the whole breadth thereof, the said last-mentioned 343 yards of the said highway.

3d. And as to 387 yards, residue of the said highway, leading over the said downs, that *Henry Reed* was liable to repair *ratione clausuræ*, as in the second plea.

4th. And as to 130 yards, residue of the highway in the said presentment mentioned, that *John Rogers* and *William Richards* were liable to repair it *ratione tenuræ*, as in the first plea.

I. The replications, as to the 350 yards, traversed the liability of *John Rogers*, *ratione tenuræ*: as to the 343 yards tendered issue, that they were not, at the time in the said presentment mentioned, so inclosed on both sides thereof by fences erected and made upon the said so last-mentioned lands, and did not continually, from that time to the time of the pleading the said plea, remain so inclosed in manner and form &c.: and as to the residue, offered similar traverses respectively as in the first and second replications, whereupon issue was joined.

At the trial before *Williams J.*, at the Cornwall Summer assizes, August 4th, 1836, a verdict passed for the crown on the first and fourth issues, and for the defendants on the second and third.

Erle, in Michaelmas term, 1886 (Nov. 4th), obtained a rule nisi for arresting the judgment on the first and fourth issues, on the ground that as the proceedings in this case had been commenced by the presentment of a magistrate,

1838.
The QUEEN
v.
Inhabitants of
MAWGAN
IN
MENEAGE.

1838.

The QUEEN
v.
Inhabitants of
MAWGAN
IN
MENEADE.

under the 18 Geo. 3, c. 17, s. 24, and as that statute was repealed by the 5 & 6 Will. 4, c. 50, s. 1, the proceedings stood as if no presentment had ever been made at all.

Crowder, on a subsequent day (a) moved for a rule nisi to arrest the judgment on the second and third issues. These pleas set up a liability in third parties, *ratione clausuræ*, but they ought to have gone further, and shewn that the inclosures were made by way of encroachment, and by parties privies in estate to the present occupiers; for it appears by Serjt. *Williams's* note to *Rex v. Stoughton* (b); that if the highway be inclosed by writ of *ad quod damnum*, or under a statute, the owner of the adjoining land is not liable to repair. This doctrine was laid down clearly in the *King v. Flecknow* (c). In this case the inclosure may have been made against the will of the owner, or under the authority of a writ *ad quod damnum*. No precedent of a liability *ratione clausuræ* is to be found in the books of entries.

Lord DENMAN C. J.—We think that these pleas should be considered (d).

Crowder and *Rowe* now shewed cause against the rule obtained by *Erie*. It is contended that judgment cannot be given in this case, because the 19th Geo. 3, c. 78, under which these proceedings were commenced, has been repealed by the 5 & 6 Will. 4, c. 50, s. 1. It is true that where proceedings are taken under an act of parliament, which have, as it were, only a statutory existence, if that act be repealed, the proceedings fall to the ground altogether. Thus, where a statute creates an offence, no judgment can be given after the statute is repealed. So in cases under

First point :
When a statute which regulates the practice of a common law proceeding is repealed, proceedings commenced under the repealed statute may be gone on with.

(a) Nov. 5, before Lord Denman C. J., *Patterson, Williams, and Coleridge, Js.*

(b) 2 Wms. Saund. 160 n. (12).

(c) 1 Burr. 461.

(d) The judgment being attested on the 1st and 4th issues, it became unnecessary to consider the validity of the 2nd and 3rd pleas.

the bankrupt acts, where certain efficacy is given to proceedings under one act, if that act be repealed, all proceedings after the repeal of the act stand as if no such statute had existed. Where, therefore, a document was enrolled; in the way prescribed by 5 Geo. 2, c. 30; but after its repeal, it was held that there could be no enrolment under that act, and that the 6 Geo. 4, c. 16, s. 95, did not apply to any anterior proceedings; *Kay v. Goodwin* (a). So, where the defendant had nonsuited the plaintiff, and would have been entitled to treble costs under this very act, the 13 Geo. 3, c. 78; if the 5 & 6 Will. 4, c. 50, had not come into operation before the judgment was signed, the Court held that the costs could not be recovered, as they were given by 13 Geo. 3, c. 78, which was repealed; *Charrington v. Meatheringham* (b). So, the 1 Geo. 4, c. 117, having altered the punishment for larceny, under the 10 & 11 Will. 3, c. 23, it was held in *Rex v. M'Kensie* (c), that an offence committed before the passing of the new act, but not tried till after, was not punishable by either act. But all these cases are distinguishable; because, in all of them it was necessary to resort to the repealed act to effect the purpose required; whereas the proceeding now in question was not created by statute, but was valid at common law. All that the 13 Geo. 3, c. 78, s. 24, did, was to substitute the presentment of a justice for the presentment of twelve men. When once the presentment was made, the statute was *quasi functus officio*. The remainder of the proceedings went on at common law, and therefore the repeal of the statute cannot prevent the common law from having its course.

II. But the 5 & 6 Will. 4, c. 50, s. 1, does not operate to repeal proceedings commenced under 13 Geo. 3, c. 78, s. 24. The legislature could not intend the absurdity of putting a stop to all proceedings that had been duly com-

(a) 6 Bing. 576.

(b) 2 M. & W. 228.

(c) Russ. & Ry. C. C. 429.

1838.

 The QUEEN
 v.
 Inhabitants of
 MAWGAN
 IN
 MENEGE.

Second point :
 The 5 & 6
 Will. 4, c. 50,
 does not re-
 peal 13 Geo. 3,
 c. 78, as to
 proceedings
 commenced
 under a pre-
 sentment of a
 justice.

1838.

 The QUEEN
 v.
 Inhabitants of
 MAWOAN
 IN
 MENRAGE.

menced and carried on under an existing act of parliament. *Surtees v. Ellison* (a) will be cited, but that case depends on the particular words of the bankrupt act then under consideration. The sound rule of construction of a repealing clause is not necessarily to hold that the word "repeal" means an absolute repeal, 2 *Dwarris on Statutes*; *Camden v. Anderson* (b). It is clear, however, from the provisions of the 5 & 6 Will. 4, c. 50, that it only repeals 13 Geo. 3, c. 78, s. 24, as to future presentments by a justice. For s. 99 enacts, "that from and after the commencement of that act it shall not be lawful to take or commence any legal proceeding by presentment." If the first section absolutely repeals 13 Geo. 3, c. 78, as to all proceedings taken by presentment, section 99 is senseless. Section 3 of 5 & 6 Will. 4, also shews that the 13 Geo. 3, c. 78, is only repealed *pro tanto*. That section keeps alive all proceedings commenced under the repealed acts, and enacts, that nothing contained in the act shall extend "to prevent the suing for any penalty incurred by any offence committed against the provisions of the said recited acts, or any of them, previous to the repeal of the said acts in and by this act, or to prevent or defend any prosecution commenced or to be brought for such offence." If the presentment is for an offence against the act, it is kept alive, if it is not, the repeal of the act cannot affect it.

Second point. *Erle and M. Smith*, contra. Nothing can be more express than the words in the first section repealing the 13 Geo. 3, c. 78. Section 3 contains certain exceptions within which the present case does not fall, as is shewn by the argument on the other side, for the offence presented is not an offence against the statute, but at common law. Section 99 was necessary in order to do away with all presentments whatever, such as a constable was entitled to make at

(a) 4 Mann. & Ry. 586; S. C. (b) 6 T. R. 723.
 9 B. & C. 750.

common law; *Burn's Jus.* (a), tit. Coustable, 645; s. 1, of 5 & 6 Will. 4, c. 50, having only repealed the statutory presentment by a justice. The words also of s. 99, "take or commence," shew that they do not relate to future presentments only, for a different meaning must be given to each word. The 6 & 7 Will. 4, c. 63, which is an act to enable the collection of rates, made under 13 Geo. 3, is a further proof that the legislature intended a total repeal of that statute.

It being clear then that the 13 Geo. 3, c. 78, is repealed, the case stands as if there were no presentment at all. [Lord Denman C. J. What effect do you give to the words in s. 3 of 5 & 6 Will. 4, c. 50, which provides, that nothing in the act is to interfere with any acts done?] That means acts done and concluded, according to the principle laid down in *Kay v. Goodwin* (b), by Tindal C. J. "I take the effect of repealing a statute to be, to obliterate it completely from the records of the parliament, as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law." The distinction sought to be drawn between an offence created by statute and the present case does not exist. It is true, it is an offence at common law, but when this Court looks at the record to give judgment, they find a presentment made under a statute which is no longer law. *Warne v. Beresford* (c) is a much stronger case than the present, for there a defendant pleaded the Westminster Court of Requests Act (23 Geo. 2, c. 27), which, at the time of plea, was a good defence to the action, and the defendant succeeded upon it at the trial. But the 23 Geo. 2, c. 27, having been repealed by the 6 & 7 Will. 4, c. 137, s. 86, before trial, judgment was entered for the plaintiff *non obstante veredicto*. It is not, however, merely for the presentment that the 13 Geo. 3, c. 78, must be resorted to, as it is only upon that statute that judgment can be given.

1838.
The QUEEN
v.
Inhabitants of
MAWGAN
IN
MEREAGE.

First point.

(a) *Doyley and Williams*, Ed.
(b) 6 Bing. 576.

(c) 2 M. & W. 848.

1838.


 The QUEEN
 v.
 Inhabitants of
 MAWGAN
 IN
 MENEGE.

The common law judgment for the offence is fine and imprisonment, but 13 *Geo. 3*, c. 78, s. 24, authorizes only a fine.

LORD DENMAN C. J.—It is no doubt exceedingly inconvenient that proceedings which had been going through various stages, and were on the point of final adjudication, should be entirely put an end to by an act of the legislature, certainly not passed for that purpose. But still, on looking at the provisions of the new Highway Act, I think that this Court is without the power to give effect to what has been done. These proceedings all depend on a presentment not made according to the common law, and as the statute has been repealed which authorized such a presentment, the case stands as if no presentment at all had been made.

LITTLEDALE J.—I think, as the 13 *Geo. 3* has been entirely repealed, all that has been done falls to the ground, and there it must remain. I do not say that the presentment was bad, but nothing further can be done upon it.

PATTESON J.—I have no doubt at all that the 13 *Geo. 3* is entirely repealed, nor have I any doubt that the legislature intended that proceedings which had been commenced should go on; but they have not chosen to express that intention, and it is only a statutory enactment that can authorize such a presentment; if there is none in existence, it follows that this Court has no power to give judgment.

WILLIAMS J. concurred.

Rule absolute to arrest judgment.



1838.

Tuesday,
June 5th.

LYONS v. MARTIN.

TRESPASS for taking the plaintiff's horse. Pleas: 1, not guilty; 2, that the defendant took the horse damage feasant in his close. Replication, that the horse was in the highway adjoining the said close, and that the defendant drove it from the highway into the said close, and then distrained it. The rejoinder took issue on the above allegations.

At the trial before *Coleridge J.* at the Middlesex sittings in this term, it appeared from the evidence of the plaintiff, that he and the defendant occupied adjoining gardens; that the horse had been in the plaintiff's garden, but that after it had escaped into the highway the defendant's servant drove it back into his master's garden, and then distrained it. It appeared further, that the same servant had on other occasions distrained cattle trespassing in the same garden, and that on these occasions he had his master's authority for so doing. It was objected for the defendant that, as the distress in question on the highway was illegal, a distinct authority to the servant should have been proved to render the defendant liable. The plaintiff contended that a sufficient *prima facie* case had been made out for the consideration of the jury, and that the defendant, by putting a plea of justification on the record, had thereby adopted the act of his servant. The learned judge was of a contrary opinion, and directed a nonsuit.

To trespass for taking the plaintiff's horse, the defendant pleaded, first, not guilty; and secondly, that the horse was damage feasant on his land. The horse was proved to have been wrongfully distrained by the servant of the defendant on the highway, and not on his land:—Held, that no *prima facie* case was made out that the defendant had authorized the distress in question, by proof of his having on other occasions authorized his servant to distrain cattle damage feasant on his land; and that he had not adopted the act of his servant by pleading a justification of it.

Humfrey now moved for a new trial, on the ground that there was sufficient evidence against the defendant to be left to the jury. The defendant's servant had more than once, in the ordinary course of his duty, distrained cattle trespassing on his master's land, and a *prima facie* case was made out that on the occasion in question also the servant had acted under his master's authority. It is a general principle of law, that the master is liable for the mistakes

1838.

LYONS
v.
MARTIN.

of his servant, acting in the ordinary course of his employment, and that the acts of the servant are, unless the contrary be shewn, the acts of the master. In the *Attorney-General v. Siddon (a)*, the responsibility of the defendant was extended even to the criminal act of his servant. A quantity of smuggled tobacco had been detected in the defendant's cellar, and, in his absence, for the purpose of protecting the tobacco from seizure, his servant procured a permit, which was for the removal of different tobacco, and produced it to the excise officer as the permit for the tobacco in question; the defendant was thereupon held liable to the penalty for unduly using a permit. *Bayley B.* there observed, "The master was certainly at liberty to have produced evidence for the purpose of rebutting that *prima facie* case; but in the absence of any evidence to rebut that case, I am of opinion that it was rightly left to the jury, and that the jury were bound to consider it as being the master's act." In that case there was no evidence of adoption of the servant's act by his master, except that which was furnished by the mere circumstance of the act having been done for the supposed benefit and protection of the master. In *Michael v. Alestree, &c. (b)*, an action was brought against the master and servant for an injury done to the plaintiff by the servant in exercising his master's horses in Lincoln's Inn Fields. The master, although absent, was held responsible, because it was intended that he sent the servant there to train the horses. The numerous cases of negligent driving also supply illustrations of the same doctrine; and in *Brucker v. Fromont (c)*, which was an action against the defendant for the negligent driving of his servant, it was decided that the declaration properly alleged the act to have been done by the defendant himself. So in *Gregory v. Piper (d)*, where the defendant ordered a servant to lay down a quantity of

(a) 1 C. & J. 220.

(c) 6 T. R. 659.

(b) 2 Lev. 172; See *Turberville v. Stampe*, 1 Ld. Raym. 264.

(d) 9 B. & C. 591; S. C. 4 Man. & Ry. 500.

rubbish, near a neighbour's wall, but so that it might not touch the wall, and some of the rubbish, after it had been put up, ran against the wall, the defendant was made liable in trespass. In *Goodman v. Kennell* (a) also, a person occasionally employed by the defendant as his servant, being sent by him on his business, took the horse of another person, in whose service he also worked, and in going rode over the plaintiff; and it was held to have been properly left for the jury to say whether or not the horse was taken with the implied consent of the defendant; and the verdict being found for the plaintiff, the Court refused to disturb it. The plaintiff has also a right to pray in aid the defendant's plea of justification, by which he admits that the plaintiff's horse was distrained by his authority, and justifies the distress (b). [Lord Denman C. J. I do not think the plea involves such an admission of the act; it rather means, *supposing* that I did the act, I had a right to do it. There is a rule now pending in this Court in an action of assumpsit for a tailor's bill. The defendant pleaded the general issue and infancy, and disputed, at the trial before me, the fact of the goods having been supplied. I certainly did tell the jury on that occasion that I could not shut my eyes to the plea of infancy, which, as it then appeared to me, admitted that the goods had been supplied, and assigned a reason why the defendant should not pay for them. It remains to be seen whether I was right in so directing them (c).] The principle of all the cases is, that it is for the jury to say whether the master has authorized the act of the servant.

1838.

 LYONS
 v.
 MARTIN.

LORD DENMAN C. J.—The ruling of the learned judge at the trial appears to me to have been quite proper. The act of the servant in driving the horse back from the high-

(a) 1 M. & P. 241.

(b) See *Stracy v. Blake*, 1 Mee. & Wels. 168; where it was held that an admission in one plea cannot

be made use of on another issue; and *Fairfax v. Empson*, ante, 385.

(c) This case has since been settled.

1838.

LYONS
v.
MARTIN.

way on to his master's land, for the express purpose of distraining it, was clearly wrongful; and this wrongful act was not in any way traced to the authority of the master by the evidence given, that he had on former occasions authorized his servant to make other distresses which were not at all wrongful. In the cases of negligent driving, the defendant has been held responsible for the conduct of his servant in doing a lawful act negligently, but here the act done is altogether unlawful. In the *Attorney-General v. Riddle (a)*, the defendant, a paper-maker, was charged with having sent out paper, not properly labelled, according to the excise acts. Evidence was offered to shew that the act charged was done by his wife in his absence; it was certainly held that this evidence was admissible, and that it was for the jury to decide whether or not the act of the wife, under the circumstances, was done under the authority of the husband. But in that case it appeared that the wife, in her husband's absence, habitually acted in the business; that she had frequently sent notices, in the way of business, to the excise officers; and that on one occasion she was employed by the defendant to pay the duty in arrear. No similar evidence of authority was given in this case, the rule therefore must be refused.

LITLEDALE J. concurred.

PATTESON J.—In the cases cited of negligent driving, the servant has had the authority of his master to do the particular act, namely, to drive along the highway, which is perfectly lawful in itself; and he has been made chargeable, because the act, so authorized by him, has been done negligently. But if the servant drives wilfully against another, the master is not chargeable for the injury done; now the present case is more analogous to the case of injury by wilfully bad driving, for as parties must be supposed to know

(a) 2 C. & J. 493.

the law, the taking the plaintiff's horse was wilfully wrongful; it was not a lawful act negligently done, but an act altogether unlawful.

1838.

LYONS
v.
MARTIN.

WILLIAMS J. concurred.

Rule refused.

The QUEEN v. LEDGARD.

Tuesday,
June 5th.

QUO warranto information against the defendant for exercising the office of councillor of the borough of Poole.

Pleas: 1. That at an election of councillors of the borough, on the 26th December, 1835, according to the provisions of the Corporation Amendment Act, (5 & 6 Will. 4, c. 76,) the defendant was duly qualified and entitled, according to the act, to be elected a councillor, and that, being so entitled and qualified, he was duly ascertained to be one of the candidates who had a majority of votes, and thereupon was duly declared to be and was elected; that he made the required declaration and was duly admitted to the office, &c. 2. That the defendant, being duly qualified in that behalf, was at the said election declared by the mayor, then being the returning officer, to have been elected councillor, &c.

1. The returning officer, at an election of councillors, under the 5 & 6 Will. 4, c. 76, has merely the ministerial duty to perform of returning the candidates who have the actual majority of votes, without reference to their possessing or not, in his judgment, the proper qualification: and where, to a quo warranto for exercising the office of councillor, the defendant pleaded that

Replications: 1, to the first plea, That the defendant at the said election was not duly ascertained to have a majority of votes at the said election, and was not duly

he was duly elected, and issue was joined thereon, it was held sufficient for the relator to prove at the trial that other candidates had the actual majority, without proving their qualification.

2. The voting papers given in at the election of councillors, which by section 35 the mayor is to cause to be kept in the town-clerk's office for six months after the election, are not such public documents as to prove themselves on production from the proper custody. Where, therefore, such papers having been handed over by the mayor to the town-clerk, were by his clerk delivered over to the clerk of the succeeding town-clerk, who produced them at the trial; it was held, that the former town-clerk also should have been called to prove that the papers transmitted by him were the same which he had received from the mayor.

3. *Quare*. In quo warranto to inquire into the validity of the election of councillors, can the title of the burgesses who voted be gone into?

1838.

 The QUEEN
 v.
 LEDGARD.

declared to be, and was not duly elected a councillor of the said borough; concluding to the country. 2, to the second plea, That though true it is that the defendant was declared by the said mayor to have been elected councillor, yet that in truth and in fact that the defendant was not duly elected, &c. Verification.

Rejoinders: 1. Joining issue as to the replication to the first plea. 2. As to the replication to the second plea, that the defendant was duly elected councillor in manner and form. Issue thereon.

The cause was tried before *Alderson* B., at the Dorsetshire summer assizes, 1836. The defendant made out a *prima facie* case, by proving that at the election in December, 1836, he was returned by the mayor as one of the nine councillors elected for the south-east ward of the borough. The counsel for the relator then opened the following case in answer:—that at the election in question there were two contending parties, the one called the mayor's party, and the other the town party. The mayor's party furnished nine, and the other party two candidates, namely, the defendant and one *Major*, and that these two, together with seven of their opponents, were elected; that the majority of the defendant and *Major* was fraudulently obtained, by some persons having delivered in fictitious voting papers, in the names of, and in addition to the papers actually delivered in by, the *bonâ fide* voters; that duplicate voting papers were delivered in in the names of seven voters, in the name of one a triplicate, and that two of the voting papers were torn; and that if in all these cases the genuine papers only had been counted, the defendant and *Major* would have been in a minority. In support of this case, *Mr. Arnold*, who had been elected town-clerk on the 1st January, 1836, produced the voting papers, which he stated he had received, on the 4th January, from the clerk of his predecessor, who was town-clerk at the time of the election; that they were brought to his office locked up in a box, the key of which was given to his clerk, and that they had been

inspected, while in his possession, by several burgesses, under section 35 of the Municipal Act. It was objected on behalf of the defendant, that these papers were not admissible in evidence, as they had not been properly traced from the mayor to the custody of the witness. The learned judge, however, on reference to the 35th section (a), admitted them as coming from the proper custody, and as being, like the poll-book, the proper record of the election, and therefore conclusive in those cases in which they were unambiguous. But, in the cases of the duplicate and the other doubtful papers, he received the testimony of the voters and other persons for the purpose of shewing which were the genuine voting papers. The effect of this inquiry being that the defendant had not a majority of such voting papers, his counsel proposed to impeach the title to be on the burgess roll of some burgesses who had voted against the defendant. The learned judge however ruled that, as their names appeared on the burgess roll, their title could not be questioned in the proceedings against the defendant. It was then further contended for the defendant, that the relator was bound to prove the qualification of all the nine candidates of the town party, because the election of the defendant could only be invalidated by proving the election of other persons being duly qualified for the office of councillor. The relator was not able to give the required evidence, but the learned judge was of opinion that no such

1838.

 The QUEEN
 v.
 LEDGARD.

(a) "The mayor and assessors shall examine the voting papers so delivered as aforesaid, for the purpose of ascertaining which of the several persons voted for are elected, and so many of such persons being equal to the number of persons then to be chosen, as shall have the greatest number of votes, shall be deemed to be elected, &c.; and the mayor shall cause the voting papers to be kept in the office of the town-

clerk during six calendar months, at the least, after every such election; and the town-clerk shall permit any burgess to inspect the voting papers of any year, on payment of 1s. for every such search; and the mayor shall publish a list of the names of the persons so elected, not later than two of the clock in the afternoon of the day next but one following the day of such election," &c.

1836.

The QUEEN
v.

LEDGARD.

issue was raised by the pleadings, and directed a verdict for the crown, reserving leave to move to enter the verdict for the defendant, if the Court should be of the contrary opinion.

Bompas Serjt., in the Michaelmas term following, obtained a rule nisi to enter a verdict accordingly, or for a new trial, if the Court should think the objections taken at the trial were sustainable.

First point :
Voting papers
of a municipal
election pro-
duced from
the custody of
the town clerk,
prove them-
selves.

Erle, Crowder, and Newman, now shewed cause. I. The voting papers were properly admitted, without any other proof than that they came from the proper custody. By the 35th section of the Corporation Act, the mayor, after the election, is to cause them to be kept, during six calendar months after the election, in the office of the town-clerk, where they are to be open to the inspection of any of the burgesses. They are therefore documents of a public nature, which are usually authenticated by the mere production of them by a clerk from the proper office. Thus the custom-house copy of the searcher's report proves the actual shipment of the goods therein specified; *Johnson v. Ward* (a). The book kept at the Sick and Hurt Office, in which are copied returns made by officers in the navy, is evidence of a seaman's death; *Wallace v. Cook* (b); and the book from the Master's office is evidence that a particular person is an attorney; *Rex v. Crossley* (c). The credit given to a will thirty years old (d), and to parish books, on their production from the proper custody, furnishes other instances. It was not therefore necessary to trace the voting papers in this case from the mayor to the former town-clerk, and from him to his successor, who produced them at the trial. II. It was not competent to the defendant, on an inquiry into his title to the office of councillor, to canvass the qualification of the burgesses who voted against

Second point :
On an issue in
a quo warranto
information
that defendant

(a) 6 Esp. 47.

(b) 5 Esp. 117.

(c) 2 Esp. 526.

(d) See *Rancliffe v. Parkyn*, 6
Dow, 149.

him. *Rex v. Hughes* (a) and *Symmers v. Regem* (b), are express authorities that under the old corporation system, on the trial of the right of the elected to a corporate franchise, the right of the electors to their corporate franchise cannot be gone into. The recent Corporation Act has made no alteration in the law in this respect. By the 18th section the burgess lists are to be revised every year, when a direct opportunity is afforded of examining into the claim of any burgess to be put on the roll. By the 22d section, the lists so revised are to be delivered to the town clerk, who is to copy the lists into a book; "and every such book, in which the said burgess lists shall have been copied, shall be the burgess roll of the burgesses of such borough entitled to vote, after the passing of this act, in the choice of the councillors," &c. The 29th section also is to the same effect, and is expressed in the most direct terms: "Every burgess of any borough, who shall be inrolled on the burgess roll for the time being of such borough, shall be entitled to vote in the election of councillors," &c. This section seems intended to preclude all question as to what may be called the opening of the register. [Lord Denman C. J. We need not hear you at present on the other point, as to the necessity of proving the qualification of the candidates opposed to the defendant.]

1838.

The QUEEN
v.
LEDGARD.

had not the majority of votes, he cannot impeach the title of the electors who voted against him.

Bompas Serjt., Barstow, Bond, and Butt, contra. I. The relator was bound to prove that the nine candidates of the party opposed to the defendant were properly qualified. That these qualified persons were elected was the only ground for contending that the defendant was not elected. Where a disqualification, or some restriction to a particular class of the right to fill an office, is created by a subsequent statute, it may not be necessary for a person elected to prove his qualification in the first instance. But here the very statute, which gives the authority to elect, imposes also the qualification necessary to the person elected; for

Third point : On a quo warranto information for exercising the office of town councillor, the relator is bound to prove that the party claiming, as against the defendant, to be elected is duly qualified.

(a) 4 B. & C. 368; S. C. 6 D. & R. 443.

(b) Cowp. 489.

1858.

The QUEEN
v.
LEDGARD.

by the 30th section, the burgesses are to elect the councillors "from the persons qualified to be councillors." The qualification is involved in and inseparable from the authority to elect, and an averment of the election of a councillor under this section could not be framed, without stating that he was elected "from the persons qualified," or that he was qualified and was elected. The pleas in this case accordingly contain an averment that the defendant was duly qualified and elected. The replication denies the defendant's election in manner and form. The ground of this denial in the replication is, that the other nine candidates were elected; and if this ground had been put specially on the record, it would undoubtedly have been necessary for the relator to aver that these candidates were qualified, and then the defendant might have rejoined that they were not qualified, so as to compel the relator to prove his averment at the trial. And even although he has made no such averment, still he should have proved their qualification, for his whole case was that they were elected, and not the defendant, and they could not have been elected unless they were qualified. [*Patteson J.* The denial is that you had not the majority; and if those who had the majority were not qualified, a quo warranto may go afterwards against them.] If notice had been given that they were not qualified, it is clear that all the votes given for them would have been thrown away; *Queen v. Boscawen (a)*, *Taylor v. Mayor of Bath (a)*, and *Rex v. Parry (b)*; and the qualification under this act being inseparable from the authority to elect, it is just the same as if notice had been given. [*Patteson J.* I rather think that the mayor has nothing to do but to ascertain who has the majority of votes, without exercising any judgment at all upon the qualification of candidates.] The 35th section requires the mayor and assessors to "examine the voting papers;" from which it should seem that he has some discretionary power assigned to him.

(a) Cited by Lord *Ellenborough* 217.
C. J., in *Rex v. Hawkins*, 10 East, (b) 14 East, 549.

II. The voting papers were received in evidence without proper authentication. They were not admissible at all; still less were they, like the poll-book, conclusive between the parties. They had no claim to the character of public documents merely because they are required by the act to be kept in a particular way. If they were public documents, a copy of them might have been given in evidence, which will hardly be contended for. By section 65, directions are given concerning the custody of the deeds and muniments of the corporation. Can it be said that they also are therefore public documents, and, if produced from such custody, that they would prove themselves? According to the general principles of evidence, these voting papers should have been identified as the papers received by the mayor, and by him handed over to the prior town-clerk, from whom they came to the witness who produced them. In *Johnson v. Ward* (a) and *Rex v. Crossley* (b), which have been cited on the other side, the papers received in evidence had been made by a public officer accredited for that purpose; and parish books are excepted from the ordinary rules of evidence by statute (c). Proof of the execution of ancient deeds and wills is dispensed with on account of the necessity of the case, because the witnesses are supposed to be dead; and proof of the sailor's death, as in the case cited, stands on the same ground of necessity, because the officers who make the returns are dispersed in various parts of the world.

III. It was competent to the defendant, on this inquiry into the validity of his election, to attack the title of burgesses who voted against him. By the 15th section, a list is to be made out of persons *entitled* to be inrolled as burgesses. The 29th section certainly enacts, that "any burgess, who shall be inrolled, shall be entitled to vote;" but this must be understood with reference to the prior section,

1838.

The QUEEN
v.

LEDGARD.

First point.

Second point.

(a) 6 Esp. 47.

(b) 2 Esp. 526.

(c) 42 Geo. 3, c. 46, s. 3.

1838.

 The QUEEN
 v.
 LEDGARD.

and to the 32d section, which prescribes the mode in which "every burgess entitled to vote," shall vote. These clauses, taken together, appear to mean that a person must be both a burgess and be also on the roll, in order to have a vote; that is, that he must be both *entitled* to be inrolled and be *actually* inrolled. There is nothing, therefore, in the act itself to preclude the opening of the register. The authorities cited merely shew that the title of the electors cannot be impeached through the medium of a quo warranto against the elected, when the electors themselves possess such a corporate franchise as may itself be made the subject of a quo warranto. [*Patteson J.* In the *Horsham* case (*a*), it was held, that quo warranto would lie against a person claiming to vote by virtue of a burgage tenement.] There is no burgage tenement in this case; the burgesses do not act, except by voting, so that their acts can only be questioned in this way. [*Erle* mentioned the case of *Rex v. Harwood* (*b*), to shew that an information would lie against a person claiming to be a freeman of a city.] In *Rex v. Hebden* (*c*), the title of the persons under whom the defendant claimed to have been elected was investigated.

Third point.

Lord DENMAN C. J.—The first question is, whether the defendant is entitled to have the verdict entered for him, on the ground that no proof was given that the candidates in competition with him at the election were duly qualified to be councillors. The defendant has pleaded, that he himself, being a qualified person, was duly elected. On this, issue is taken in the replication, and it is said, that if the replication were fully expanded, so as to plead the election of other persons as an answer to the supposed election of the defendant, it could not have dispensed with an averment that those other persons were duly qualified:

(*a*) Cited in a note to *Rex v. Mein*, 3 T. R. 599. *v. Pepper*, 3 N. & P. 155.

(*c*) 2 Str. 1109.

(*b*) 2 East, 177; and see *Rex*

that, as this would necessarily be the course of pleading, if the real answer to the defendant's case had been put on the record, the course of proof at the trial should have been the same, and the election of other persons should not have been admitted as any answer to the defendant's election, without proof that they were duly qualified. The 30th section, which provides that the burgesses shall "elect from the persons qualified," may appear to give some countenance to this argument. But, on considering the mode of election, and the manner in which the return is to be made, by the 35th section, I am of opinion that the proposed construction is erroneous, and that there is no ground for entering the verdict for the defendant. The 28th section mentions what persons shall be disqualified; and as no objection appears to have been made at the election to the candidates, as labouring under disqualification, we must assume that they were properly qualified. The mayor had nothing to do but to return those who had the actual majority; and, supposing it to have been proved at the trial, that other candidates had such a majority over the defendant, the rule for a new trial must also be discharged. This brings us to the question, whether the papers received at the trial were legitimate evidence of the votes given at the election. It is said that the 35th section makes them public documents, and excludes the necessity of any verification of them beyond what is afforded by their coming from the proper custody, which is that of the town-clerk for the time being. But we should do much more than give effect to this clause, if we were to say either that such papers were conclusive like the poll-book, or that they could be received as evidence at all, without any explanation to shew that they were what they purported to be; or to trace them from their original custody to that of the witness who produced them. We think, therefore, that there has been a misreception of evidence, and that there must be a new trial. It is not necessary to consider the other point.

1838.

The QUEEN
v.
LEDGARD.

First point.

1838.

The QUEEN
v.

LEGGARD.

First point.

LITLEDALE J.—I agree with my Lord that there is no ground for entering the verdict for the defendant, and that, with respect to the voting papers, they were not properly traced. I do not say it would be necessary to call the voter to prove what papers he gave to the mayor, but the former town-clerk ought certainly to have been called to prove that the papers handed over to his successor were received from the mayor.

Third point.

PATTESON J.—I am of the same opinion on both points. The elector must take it upon himself to decide whether the candidate for whom he votes is properly qualified or not. The returning officer has nothing but the ministerial duty to discharge, of returning the candidate who has the actual majority. It would obviously encourage partiality and fraud to allow him to exercise judicial functions with respect to qualification, and to return the candidate who is in a minority, on the ground that his opponent is not properly qualified. It appears to me that, even if the relator had specially replied the election of others than the defendant, there would have been no necessity for proving their qualification.

First point.

As to the other point about the voting papers, though the act does not constitute them a record of the election, yet I think that they are the proper evidence of it, and the only question is, whether the papers produced at the trial were the *same* papers that were given in at the election. The witness said he received them in a box from the clerk of the former town-clerk. The least that could have been done, therefore, especially where there is so much room for trickery, on account of these papers being open to public inspection, was, to call the former town-clerk and his clerk to prove that the identical papers were handed over to them by the mayor. Perhaps the mayor ought to have been called, but that is not necessary for us to determine, or whether the voters also should have been called to prove what papers they gave to the mayor. In the criminal courts,

where the identity of property, which has passed through several hands, is material, not a single link in the chain is dispensed with.

1838.

The QUEEN
v.
LEDGARD.

WILLIAMS J.—It was not denied that the custody of the papers was quite proper, at the time of the trial. The question was, what had been the custody up to that time, and whether they were the identical papers with those given in by the voters at the election. Here there was a chasm in the proof, and the defendant is entitled to a new trial. First point.

I quite agree also on the other point, that the mayor has no power of originating in his own mind objections to the candidates, and that he has nothing to do but to report the actual majority. Third point.

Rule absolute for a new trial.

Rule discharged for entering the verdict for the defendant.

PARNABY and others v. The LANCASTER CANAL
COMPANY.

Wednesday,
June 6th.

CASE. The declaration stated, that by the 32 Geo. 3, (local) intituled "An Act for making and maintaining a navigable Canal from Kirkby Kendal, in the County of Westmoreland, to West Houghton, in the County Palatine of Lancaster, and also a navigable Branch from the said intended Canal at or near Borwick to or near Warton Cragg, and also another navigable Branch from at or near Gale Moss by Chorley to or near Duxbury, in the said County Palatine of Lancaster," it was enacted, that certain persons should were payable by them to the company. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up within a certain time, that it *should be lawful* for the Company to do so, and to keep the same till payment were made of all expenses thereof:—Held, that these words were compulsory upon the Company, and that they were liable, in an action on the case, for an injury occasioned by their non-removal in due time of a sunken vessel. An act of parliament constituted a Company for the purpose of making and maintaining a canal to be passable for boats. All persons were to be allowed to navigate the canal, and certain tolls

1838.

~
PARNARY
and others
v.
LANCASTER
CANAL
COMPANY.

be united into a Company for the carrying on, completing and maintaining the said intended navigable canal passable for boats, &c., and that it should be lawful for the said Company to take for their own use the rates and duties in the act mentioned, and that all persons should have free liberty to navigate upon the canal. And that if any boat or vessel should be placed or lie abreast or athwart in any part of the said canal, &c., not being moored at both ends, or if any person or persons navigating any boat or vessel should wilfully obstruct the navigation of the said canal, by means of such boat or vessel, and the person having the care of such boat or vessel should not immediately, upon request, moor the same at both ends, or remove, stop, or effectually secure the same, as the case should require, every person so offending should for every such offence forfeit a sum not exceeding 10s. nor less than 5s., and also a like sum for every hour such neglect or obstruction should continue, and that *it should be lawful* for the agents or servants of the Company to cause any such boat or vessel to be unloaded, if necessary, and to be removed in such manner as should be proper for preventing such obstruction in the navigation, and to seize or detain such boat or other vessel, and the loading thereof, or any part of such loading, until the charges occasioned by such unloading and removal were paid; and that if any boat or vessel should be sunk in the said canal, and the owner or owners, or person or persons having the care of such boat &c., should not within twenty-four hours weigh or draw up the same, *it should be lawful* for the agents or servants of the company to cause such boat or vessel to be weighed or drawn up, and to detain and keep the same till payment were made of all the expenses thereby necessarily occasioned. That the canal had been completed, and that the Company had been accustomed to take rates and duties in respect of boats and vessels passing along the canal: that the plaintiffs were owners of a fly-boat, wherewith they had been accustomed to pass and repass along the canal, paying to the Company therefore such rates and duties as were allowed

by the said act: that on the 1st March, 1836, a certain boat sank in the canal, and lay athwart the same, and was moored only at one end, and obstructed the navigation of the canal, so that boats and vessels passing in the day-time could with difficulty avoid or pass such obstruction, and boats passing at night and in the dark would be in great danger of striking against the same. Yet the Company, by their servants, did not perform their duty in the premises, but wholly neglected the same in this, to wit, that although twenty-four hours had elapsed before the accruing of the damage thereafter mentioned, and although the Company might have required the owners or persons having the care of the said boat, to moor the same at both ends, or to remove &c., and to weigh and draw up the same, and if the same had not thereupon been done without loss of time, might and ought to have caused such boat to be weighed and drawn up before the time when &c., and might and ought in the meantime to have caused some light or other signal to be so placed as to enable persons guiding boats or vessels in that direction to avoid the same; yet the Company did not nor would &c. &c., by means whereof the fly-boat of the plaintiffs struck against the boat so sunk, and was greatly damaged, &c.


.. Plea: not guilty.

.. The cause was tried before *Coleridge J.*, at the Liverpool summer assizes, 1836. After the case for the plaintiffs had been opened, the counsel for the defendants objected that the act of parliament, upon which the declaration was framed, imposed no duty upon the defendants to remove the obstruction which had caused the injury complained of. For the plaintiffs it was contended, that the clause enabling the Company to make a canal and to keep it navigable compelled them to do so, and *Rex v. The Severn and Wye Railway Company* (a) was relied upon. The learned judge, after conferring with Mr. Baron *Parke*, was of opinion that

(a) 2 B. & Ald. 646.

1838.

~
PARNABY
and others
v.
LANCASTER
CANAL
COMPANY.

1838.

 PARNABY
 and others
 v.
 LANCASTER
 CANAL
 COMPANY.

the plaintiffs ought to be nonsuited, but allowed the cause to go on, reserving leave to the defendants to move to enter a nonsuit, and the plaintiffs obtained a verdict on the merits.

Cresswell, in Michaelmas term, 1836, having obtained a rule nisi,

Alexander, Wightman, G. Henderson, and Tomlinson, shewed cause (a). The question is, whether the act, as set out in the declaration, does not make it imperative upon the Company to keep their canal navigable and free from obstructions. The rule should rather have been to arrest the judgment, for the question is completely raised on the declaration. The words in the act, that "it shall be lawful" for the Company to raise sunken vessels, do not give any latitude to the Company to do the act authorized, or to omit to do it, at their pleasure. Permissive words in a statute have been frequently held to be obligatory, for the sake of the public good; *Dwarris's Statutes* (b), *Rex v. The Commissioners of Flockwold Inclosure* (c), *Rex v. The Corporation of Eye* (d), *Scales v. Pickering* (e), and *Blakemore v. The Glamorganshire Canal Navigation* (f), illustrate this point. *Rex v. Broderip* (g), which may appear to be an authority the other way, was decided on another point. But independently of the imperative words in the act by which the Company is constituted, they are liable on the general principles of law applicable to their peculiar relation to the public. From the right of the public to use the canal, and the right of the Company to take tolls, there results an obligation on the Company to remove obstructions in the canal. It is a public highway, *Rex v. Trafford* (h), *Rex v. The Severn and Wye Railway Company* (i), and the

(a) In Easter term last, May 4, before Lord Denman C. J., *Patterson and Coleridge Js.*

(b) Vol. ii. p. 712.

(c) 2 Chitty, 251.

(d) 1 B. & C. 85; S. C. 2 D. &

R. 172.

(e) 4 Bing. 448.

(f) 1 Mylne & K. 154.

(g) 5 B. & C. 239; 7 D. & R. 861.

(h) 1 B. & Ad. 874.

(i) 2 B. & Ald. 646.

right of the public to pass along it is nugatory, unless it be compulsory on the defendants to keep it in a fit state for the public use. If one of their own embankments had fallen in, and had been suffered to lie unrepaired, so as to impede the navigation, the defendants would certainly be liable. The only difference between that case and the present is, that here the sunken vessel, creating the obstruction, belonged to others; but that circumstance is quite immaterial, for the act gives the defendants express power to weigh up such a vessel. The liability of companies and public bodies for injuries occasioned by their negligence, has been established by several cases; *Leader v. Moxton* (a), *Matthews v. West London Waterworks Company* (b), *Weld v. The Gas Light Company* (c), *Jones v. Bird* (d). In *Harris v. Baker* (e), *Boulton v. Crowther* (f), and *Sutton v. Clarke* (g), which may be mentioned on the other side, the defendants represented persons who had acted in discharge of a public duty and without emolument, as in *Governor &c. of Cast Plate Manufacturers v. Meredith* (h), in which case, besides, a particular remedy had been pointed out by the act. The defendants in this case are remunerated by tolls, for the performance of the duties voluntarily undertaken by them, and it is not necessary to bring assumpsit, in order to take advantage of the circumstance that they are so remunerated. In *The Proprietors of Stourbridge Canal Company v. Wheeley* (i), it was considered as a rule of construction well established, that any ambiguity in the language of acts like the present, should operate in favour of the public (k).

1838.

PARNARY
and others
v.
LANCASTER
CANAL
COMPANY.

(a) 3 Wilson, 461.

(b) 3 Camp. 403.

(c) 1 Stark. 189.

(d) 5 B. & Ald. 837; S. C. 1 D. & R. 497.

(e) 4 M. & S. 27.


(f) 2 B. & C. 703; S. C. 4 D. & R. 195.

(g) 6 Taunt. 29.

(h) 4 T. R. 794.

(i) 2 B. & Ad. 792.

(k) They also argued, that under the plea of not guilty the defendants could not dispute the duty as laid in the declaration, but the judgment of the Court renders it unnecessary to report this part of the argument.

1838.

 PARNABY
 and others
 v.
 LANCASTER
 CANAL
 COMPANY.

guilty. On the trial before my brother *Coleridge*, the jury found a verdict for the plaintiffs to the full extent of their loss, but defendants obtained a rule for entering a nonsuit, according to leave reserved, and we have heard that rule fully argued.


We do not feel the smallest doubt that this action may be maintained. The only one of the numerous cases cited, that appeared to point the other way, is *Harris v. Baker* (a), where trustees of a road were held not liable to an action for a personal injury arising from the plaintiff's wife falling, in the night-time, over a heap of scrapings, placed on the road-side by defendant, who placed no light to give notice of the obstruction. But that case may be distinguished, as the action was against public officers who derived no benefit from the road. The present defendants, on the contrary, invite the whole public to navigate on their canal, in consideration of the tolls paid. They have lawful power to make the canal in all respects fit for navigation, and particularly to remove the kind of obstruction by which the plaintiffs suffered. It is the same, in principle, as if they announced the carrying on of a business at premises accessible only by a certain road over their land, which was open to the public for that purpose, but which they only, and not the public, had a right to repair, and then left that road in so bad a state, that a person's leg was broken, when he came to transact business with them there. A more familiar example, and not of very rare occurrence, is that of a shop-keeper who leaves a trap-door open in his shop, and causes a customer to fall down and suffer injury. We think the defendants are certainly liable, it is therefore needless to enter upon the other point made, as to the effect of the plea of not guilty.

Rule discharged.

(a) 4 M. & S. 27.



a party is liable to repair a road, he is not therefore liable for an obstruction on it caused by others. Suppose a wagon to be overturned by others, and left in a road, which a party is liable to repair *ratione tenuræ*, would he be liable for the obstruction? Nor can it be said that the taking tolls would make any difference. In the case put, of a wagon left in the road, would the owner of a toll traverse or toll thorough be liable? Besides, the circumstance that tolls are taken by the defendants is not material in this form of action, though it might be in *assumpsit*; and, in truth, it can never be material, unless the defendants are also actors. In the cases cited on the other side the defendants had been actors, and were held liable for injuries occasioned by their own acts, but it is sought to make these defendants liable for the acts of others. The clause in the act empowering the Company to weigh a sunken vessel, cannot carry their liability beyond that of the owners of the vessel, and *Rex v. Watts* (a) is an authority that an indictment does not lie against the owner of a vessel sunk in a navigable river, for not removing it.

1838.

 PARNABY
 and others
 v.
 LANCASTER
 CANAL
 COMPANY.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—This was an action on the case against the defendants for negligence, in leaving a sunken barge in their canal, which the plaintiffs' vessel ran against and thereby was sunk. The declaration set forth portions of the act, by which the defendants were empowered to make a canal passable for all boats, and to receive tolls for their passage, and to raise such vessels as might be sunk in their canal, if the owners should omit to do so after twenty-four hours: it then alleged a duty in defendants to keep the canal clear and safe for navigation, and stated that the plaintiffs' vessel was navigating there, using the canal and paying toll to the defendants: and lastly, described the injury sustained from the vessel after the twenty-four hours. The only plea was, not

(a) 2 Esp. 675.

1838.

 KEABLE
 v.
 PAYNE.

time he gave it that the cheque would not be paid, and that the defendant sold them and received the money before the action was brought.

Kelly had obtained a rule nisi for a nonsuit in the ensuing Michaelmas term, in pursuance of leave reserved by the learned judge, on the ground that the cheque was inadmissible in evidence.

B. Andrews and *O'Malley* now shewed cause. Several cases have decided that an unstamped instrument is admissible in evidence for a collateral purpose, though not to enforce an agreement between the parties. The cases are collected in 2 *Stark. on Ev.* 772, 2d ed., and they establish the proposition, that, when a person is charged with forgery, usury, or fraud, the instrument to prove the offence is admissible though unstamped. It is not only in criminal cases that such evidence has been received, but in all cases where the intention of the party was required to be proved; *Dover v. Maestaer* (a), *Gregory v. Fraser* (b), *Nash v. Duncomb* (c). The case set up here was, that *Mann* obtained the bullocks by fraud; it was therefore competent to the plaintiff to shew that the giving the cheque in question was an ingredient of that fraud. It is clear that, if the bullocks were obtained under such circumstances, no property in them passed to the defendant, who could have no better title than *Mann* possessed; *Earl of Bristol v. Wilsmore* (d), *Shelley v. Ford* (e); and therefore the fraud committed by *Mann* was an essential branch of the inquiry. The admissibility in evidence of an unstamped draft, drawn on bankers who reside more than ten miles from the place where it was issued, was discussed in *Rex v. Pooley* (f). After the discussion of the point before the twelve judges, the prisoner

(a) 5 Esp. 92.

(b) 3 Camp. 454.

(c) 1 Moo. & Rob. 104.


(d) 1 B. & C. 514; S.C. 2 D. & R. 755.

(e) 5 C. & P. 313.

(f) 3 B. & P. 311.

was pardoned upon another ground, and was tried again for the offence laid in a different form; and at the second trial, on the cheque being tendered in evidence, the Court held, that it was admissible for collateral purposes, though not for the purpose of recovering the sum for which it was drawn. [*Williams J.* In *Rex v. Gillson (a)*, where the prisoner was indicted for feloniously burning his house with intent to defraud an assurance office, it was held that an unstamped policy was not admissible in evidence to prove the contract. The prisoner in that case was not connected with the instrument, as in the cases cited of forgery and usury.] The instrument there was rejected, on the ground that it was necessary to prove a valid contract of insurance, for otherwise the prisoner could not defraud the office. If the policy was unstamped, the prisoner could not have recovered upon it, and the office could not be defrauded. The present case proceeds on the assumption that the cheque given by *Mann* was valueless and fraudulent, and that according to *Rex v. Freeth (b)* the giving it in payment, when he knew it to be valueless, amounted to a fraudulent representation.

Kelly and *Gunning*, contra. The cases cited are all distinguishable. For the purposes of criminal justice, the strong words of the statute of *Ann. (c)* have been got over in cases of forgery; and rightly, because that offence could not be proved except by the production of the instrument itself, and a party cannot take advantage of his own wrong. The like principle has been extended to cases of usury, which is *quasi* an offence. But these decisions are not to be extended beyond the necessity of the case. [*Patteson J.* In *Rex v. Fowle (d)* it was held that, on an indictment for a conspiracy to defraud the creditors of the party, an agreement entered into by the prisoner, though

1838.

 KEABLE
 v.
 PAYNE.

(a) 1 Taunt. 95.

(b) Russ. & Ry. 127.

(c) 10 Ann. c. 19, s. 105, perpetuated by 10 Ann. c. 26, s. 73.

(d) 4 C. & P. 592.

1838.
 ~~~~~  
 KEABLE  
 v.  
 PAYNE.

not stamped, was admissible to prove the fraud. If that be good law, I cannot see why, if it was necessary to prove *Mann's* fraud in this case, the unstamped instrument was not equally admissible.] This case is very different; if *Mann* was indicted for the misdemeanor, it might perhaps be admissible against him; but the question here is between other parties, and the plaintiff must prove the contract with *Mann* by legal evidence, although it may be void by reason of fraud. Even against *Munn* it would depend on the crime for which he was indicted whether it would be admissible or not. If he were charged with larceny on the authority of *Semple's* case (*a*), then the cheque would be the very essence of the offence, and it could not be given in evidence; *Rex v. Gillson* (*b*). It is too much to say, therefore, that when fraud is to be proved as against a third party, not privy to it, an unstamped instrument is admissible to prove any link in it. The line may be well drawn by admitting it only in those cases where it is the subject-matter of the offence, as in forgery, usury, and conspiracy. The case of *Nash v. Duncomb* (*c*) is the only decision in a civil proceeding that carries the doctrine of admitting unstamped instruments at all further. That was a defence of usury, and Lord *Tenterden* admitted the evidence very cautiously; and, as the plaintiff obtained a verdict, there was no necessity for considering the propriety of his decision. That also was an action between the parties to the instrument.

Lord DENMAN C.J.—I am of opinion that the cheque was properly received in evidence at the trial. No authority whatever is to be found against its reception, except in the words of the statutes (*d*), which the decisions shew are not to be taken absolutely. To prove the fraud committed by

(a) 1 Leach, C. C. 424.

(b) 1 Taunt. 95.

(c) 1 Moo. & Rob. 104.

(d) 23 Geo. 3, c. 49, s. 14; 35

Geo. 3, c. 55, s. 10.

*Mann* exactly the same evidence is admissible as if *Mann* himself were on his trial for obtaining the bullocks by false pretences, with the exception, of course, that the admissions made by him would not be admissible against a third party. The proof as to the fraud therefore assimilates itself to the cases of forgery and usury in which unstamped instruments have been received; and I think that, when fraud is attempted to be set up in an inquiry material to the issue, an unstamped instrument, which has been made use of in the transaction, is receivable in evidence, whether the fraud be committed by a party to the suit, or by a third person.

1838.  
  
 KEABLE  
 v.  
 PAYNE.

LITLEDAL J.—Though the words of the statutes are absolute, that an unstamped instrument shall not be given in evidence, it is admitted still that in certain cases, as forgery, usury &c., it is admissible. But it is contended that it is not admissible when the instrument does not form the subject-matter of the contract or prosecution. I think however that when fraud is to be proved, all may be given in evidence that tends to establish it.

PATTERSON J.—I cannot recognise the distinction which is set up between a fraud committed by a third party and a defendant who is sought to be affected by such fraud. I put it broadly that, when it becomes necessary to prove a felony to have been committed, the same evidence is admissible to prove the felony as would be on an indictment for it, with the exception, that admissions made by the felon subsequent to the transaction would not be admissible. This exception is illustrated by the case of a receiver, against whom even the judgment against the principal is not receivable, and much less his confessions. I admitted them once at York against a receiver, but I afterwards came to the conclusion that I was quite wrong. But with that exception all the same evidence is receivable as if *Mann* had been indicted for the felony. The cases clearly

1838.

KEABLE  
v.  
PAYNE.

shew that in that case the cheque would have been receivable, for it is not like *Rex v. Gillson (a)*, where it was necessary to prove a valid contract, which was quite immaterial here.

WILLIAMS J.—I consider the question as to the admissibility of the cheque just as if what used to be termed a flash note had been given for the bullocks. There can be no doubt that a flash note would be admissible to prove the fraud; then why not this cheque, which tends equally to prove it?

Rule discharged.

(a) 1 Taunt. 95.



Wednesday,  
June 6th.

WILDER v. SPEER, GRAVES and others, WINCH and others.

1. Distrainers are bound to see that the pound to which they take the distress is in a fit state to receive it, and therefore if the pound is wet and muddy, the distrainers are liable for any damage thereby caused to the distress.

2. Where the plaintiff alleged that the defendants impounded his cattle, and that the pound was *then* too small to hold the cattle in a fit and proper manner, and was *then* wet and dirty, and wholly unfit for impounding the same, whereby special damage accrued, and the defendants traversed that the pound was too small, or that it was wet, &c. *modo et formà*, omitting the word *then*: Held, that the issue raised was not as to the general size and state of the pound, but as to its condition at the time of impounding.

TRESPASS for distraining the plaintiff's ewes and wethers, and chasing and driving them at a furious rate, the said ewes being then with lamb, and for impounding the said sheep in a small, wet, muddy, and dirty pound, and for detaining them there for a long time, to wit, for two days; setting out special damage, that the ewes brought forth their lambs prematurely, and that divers of the lambs were trampled to death and drowned, &c. &c.

The defendant *W. Speer* pleaded, 1st, not guilty; 2dly, that the ewes and wethers were not the property of the plaintiff; 3dly, that before and at the said times when &c. the said *W. Speer* was seised in his demesne as of fee of and in the manor of Weston, and of and in a certain close, waste, or common situate in the parish of Thames Ditton,

then and still being parcel of the manor, and then justified the alleged taking to be for a distress damage feasant, and that he impounded the same in a certain common pound within the said manor, doing no unnecessary damage, &c. 4thly, That he the said *W. Speer*, at the said several times when &c., took and distrained the said ewes &c. in a certain close, waste, or common, situate &c., and which said close, before and at &c., was and still is within and parcel of the manor of Weston, in &c.: and the said *W. S.* further says, that he, before and at &c., was seised in his demesne as of fee of and in the said manor and of the said close &c., and that the plaintiff, before and at &c., was possessed of a certain messuage and a certain small quantity of land, to wit, one rood with the appurtenances, situate, lying, and being within and parcel of the said manor aforesaid, by reason whereof the said plaintiff ought, during all the time aforesaid, to have had common of pasture for all commonable cattle, levant and couchant, in and upon her said messuage and lands. The defendant *W. S.* then averred that the plaintiff, under colour of her said right of common, wrongfully surcharged the common with the ewes and wethers in the declaration mentioned, and justified the taking for the cause aforesaid, as in the third plea.

The defendants *Graves* and others pleaded four similar pleas, justifying as the servants of *W. Speer*. The defendants *Winch and others* also pleaded similar pleas, justifying as commoners of the manor of Weston.

The plaintiff took issue on the first two pleas, and replied severally to the pleas of justification, that the defendants, after they had seised, taken, and distrained the said ewes &c., for and in the name of a distress for the said damage feasant, chased, drove, and hurried about the said ewes &c. under the said distress, in a wanton and cruel manner, and to a greater degree, and with more force and violence, and at a quicker and more furious rate than was necessary, and then impounded the same under the said distress in the said pound in the said declaration mentioned, which was then

1838.

WILDER  
v.  
SPEER  
and others.

1838.

WILDER

v.

SPEER  
and others.

too small to hold or contain the same in a fit and proper manner, and which was then very wet, and muddy and dirty, and wholly improper for impounding the same, and thereby greatly injured the said ewes &c., as in the said declaration mentioned, and abused the said distress.

The defendants rejoined respectively to each replication of excess, that they did not chase, drive, or hurry about the said ewes &c. under the said distress in a wanton or cruel manner, or to a greater degree, or with more force or violence, or at a quicker or more furious rate, than was necessary, nor was the said pound in the said declaration mentioned, in which &c., too small to hold or contain the said ewes in a fit and proper manner, nor was the same wet, muddy, or dirty and improper for impounding the same in manner and form &c.

Upon these rejoinders issue was joined.

At the trial at the Surrey Summer assizes, 1836, before Lord Abinger C. B., it appeared that the plaintiff occupied a small cottage, with three or four roods of land, within the manor of Weston, and that she and her husband, before his death, had been in the habit of surcharging the common of the manor with a large quantity of sheep, amounting at times to between two and three hundred. The defendant *W. Speer*, who was lord of the manor, in 1835 had impounded some of the sheep, and the plaintiff for some time discontinued to surcharge. She afterwards, however, repeated the practice, and having in January, 1836, turned upwards of two hundred sheep on the common, the commoners gave her notice, that unless she removed the sheep they would distrain them on the following day. She refused to remove them, and on Thursday, the 21st January, the defendants *Graves and others*, who were servants of Mr. *Speer*, the lord of the manor, and the defendants *Winch and others*, who were commoners, distrained about 150 of the plaintiff's sheep, and drove them to the lord's pound. The pound-keeper offered the plaintiff's shepherd to release the sheep on the payment of 10s., but the shepherd refused, and

the sheep were impounded till the Saturday following, when the 10s. were paid and the sheep released. It appeared that for a day or two previous to that time the weather had been inclement, with a heavy fall of snow, and that the pound, which was about twenty-five feet square, was in a wet and muddy state. The ewes were lambing at the time of the distress, and two or three of the lambs, dropped during the nights the ewes were impounded, were trampled to death. At the close of the opening of the plaintiff's case, the Lord Chief Baron intimated that there was no case against Mr. *Speer*, upon which it was agreed that a verdict of not guilty should be entered for him on the first issue, and that the jury should be discharged from giving a verdict on the other issues raised by him.

1838.  
  
 WILDER  
 v.  
 SPEER  
 and others.

*Platt* for the plaintiff, on the facts above stated, contended that as it appeared that at the time of the distress the pound was in a muddy, unfit, and improper state to receive so many sheep, the defendants were liable for the special damage. The Lord Chief Baron was of opinion that the issue raised upon the record was not whether the pound, on that particular night, was, from the inclemency of the weather, unfit and improper, but whether it was generally so; and he left it to the jury to say whether the pound was sufficient generally, and if so to find a verdict for the defendants. The jury found for the defendants. *Platt*, in Michaelmas term, 1836, obtained a rule nisi for a new trial on the ground of misdirection.

*Andrews* Serjt. and *M. Chambers* now shewed cause for *Winch* and the other commoners. Even if the direction of the Lord Chief Baron was not correct in terms, the question was in substance properly left to the jury. As far as the commoners are concerned an issue as to the state of the pound at the moment of impounding is an immaterial issue, for *they* are not responsible for the state of the pound, although the lord

1838.

WILDER  
v.  
SPEER  
and others.

of the manor may be so. It is laid down in the digest and text books (a), that if a distrainor put a horse into a pound with spikes in it, and the horse wound himself, the distrainor is liable, and for this position *Vaspor v. Edwards* (b) is cited; but the position is there only thrown out at the bar *arguendo*, and *Doctor and Student*, Dial. II. c. 27, is cited for it; whereas on examining that book there is no authority for such a position. The law with regard to pounds is, that cattle damage feasant must either be taken to the public pound where they are to be kept by the owner, or they may be taken to a private pound in the close of the distrainor, or of another by his consent, where the owner may give the cattle meat and drink without committing any trespass; in which case, unless the distrainor give notice of the place of impounding, he must provide for them himself; *Co. Lit.* 47. But if the public pound is resorted to, as it may be, without regard to the season, the distrainor, if he has taken the distress for just cause, cannot be made liable for the damage produced by the weather, and the reason is, that "in him that distrained there can be assigned no default, but in the other may be assigned a default;" *Doctor and Student*, Dial. I. c. 5. The issue perhaps is not formally raised on this record, it ought to have been as to the general state of the pound, not as to its particular state at the time of impounding from accidental causes. But as the jury have found that the pound was generally sufficient, there is no ground for a new trial.

*Shee* shewed cause for the defendants *Graves and others*. The direction of the Lord Chief Baron was right on the issue joined. The allegation in the replication is not that the pound was too small generally, but that it was *then* too small; the rejoinder takes issue upon this averment, but omits the word

(a) See Vin. Abr. Distress (P), (1st ed.)

14; Bradby on Distresses, 240, (b) 12 Mod. 658.

"then." The real issue therefore was whether the pound was sufficient generally.

1838.

WILDER

v.

SPEER  
and others.

*Thesiger*, with whom was *De Saumarez*, appeared for the defendant *Speer*.

*Platt*, *contra*, was not called upon by the Court.

LORD DENMAN C. J.—The question raised for the Court to decide is, whether, supposing a pound to be immersed in water or to be otherwise unfit at the time of impounding a distress, the distrainers would make themselves liable for any damage caused by the state of the pound. The question on this record is not what the state of the pound generally was, but what it was at that particular moment; and as that question has not been left to the jury, there must be a new trial.

LITLEDALE J.—It is imperative on a distrainer to provide a proper pound for the distress he has taken. The law does not allow him to imprison the cattle of another without seeing them properly provided for. I think the terms of these issues relate expressly to the state of the pound at the time and not to its general condition.

PATTESON J.—It is contended that the issue raised as to the commoners is an immaterial issue, but if that be so, and the plaintiff obtains a verdict, the defendants may move to arrest the judgment.

Rule absolute(a).

(a) *Williams J.* had left the Court.

1838.

Thursday,  
June 7th.

The Court refused a mandamus to a board of guardians to admit a person as their clerk, who complained that the person filling the office had been unduly elected, by the votes of guardians who were themselves not properly elected.

The QUEEN v. The Guardians of the DOLGELLY UNION.

*JERVIS* had obtained a rule calling upon the defendants to admit one *John Jones* to the office of clerk to the board of guardians, and to permit him to perform the duties of that office. The affidavits on which the rule was obtained stated, that the said *John Jones* and one *Richard Jones* had been candidates for the office of clerk, and that an election for the office had been held without due notice; that although *Richard Jones* had obtained the majority of votes, the guardians themselves had voted for *Richard Jones*, and that many of them were not properly elected; and that *John Jones* had the majority of legal votes.

*R. V. Richards*, in Easter term last (a), shewed cause. Two questions are raised in this case; first, that the guardians of a union have no right to vote at an election for a clerk; and second, that if they have, many of the guardians who voted for *Richard Jones* were not duly elected themselves. But it is submitted that the Court will not enter into this question. In *Rex v. Carpenter* (b) this Court refused a quo warranto information for the office of a guardian. If the election of the guardians be disputed in this inquiry, it is equally open to canvass the titles of those who elected the guardians, and thus an interminable inquiry is set on foot.

*Jervis*, contra. The title of the guardians only, not of those who elected them, is attacked on the present occasion, therefore the inconvenience suggested could not arise. In *Rex v. The Trustees of the Cheshunt Turnpike Roads* (c), the Court issued a mandamus to admit the clerk to the trustees, which is a very similar office.

*Cur. adv. vult.*

(a) May 8th, before Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

(b) 1 N. & P. 773.

(c) 5 B. & Ad. 438.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This was an application for a mandamus to the guardians of the Dolgelly union to admit *John Jones* as their clerk, and to permit him to perform the duties of that office. Another clerk, *Richard Jones*, had been admitted and is acting, but the applicant says that *Richard Jones* was not duly elected. There was a contest and a poll, and though *Richard Jones* was returned, *John Jones* asserts that he had the majority of good votes, and ought to have been returned. In effect, therefore, it is proposed to set on foot a scrutiny of all the votes given in the election of the guardians, in the shape of a mandamus, to admit their own servant to a ministerial office. No precedent for such a course was quoted: the inconvenience of thus unravelling the rights of voters in an antecedent stage would be very great, and we think it ought not to be permitted. There is a preliminary difficulty of no light importance. If we send the writ, who must make the return? That question must be answered before the return can be made; yet the object of the proceeding itself is to settle that question. If the guardians *de facto* are to make the return, it must be because they are in possession, and competent to do the duties attached to their office: one of them is to appoint a clerk; they have done so, and the public suffer no inconvenience from a vacancy of the office. The rule must be discharged.

Rule discharged.

The QUEEN v. The Commissioners of the Insolvent Debtors' Court.—In the matter of HAMLIN.

*CROWDER* had obtained a rule calling upon the Commissioners of the Insolvent Debtors' Court to shew cause why a writ of prohibition should not issue directed to them, damages and costs, may be discharged under the Insolvent Debtors' Act, 7 Geo. 4, c. 57, without previous reversal of his outlawry.

1838.

The QUEEN  
v.  
The Guardians  
of the  
DOLGELLY  
UNION.

Friday,  
June 8th.

A prisoner in custody on a *capias utlagatum* for non-payment of

7 Geo. 4, c. 57,

1838.

The QUEEN  
v.  
The Insolvent  
Debtors'  
Court.

to prohibit them from further proceeding in an order made by them on the 13th December, 1837, for the discharge of one *Hamlin* out of custody.

It appeared by the affidavits that the prisoner had been sued by one *Crossley* in an action for criminal conversation. The plaintiff had obtained a verdict, and had signed judgment for 288*l.* damages and costs. The defendant was proceeded against to outlawry, and being taken into custody on the 3d December, 1837, on a *capias utlagatum*, was confined in Hertford gaol. The defendant petitioned the commissioners of the Insolvent Debtors' Court for his discharge on December 10th, and on December 13th the commissioners adjudged that he should be discharged, after remaining in Hertford gaol four months from the date of his petition.

Sir *W. W. Follett*, in Hilary term (a) last, shewed cause. The 10th section of 7 *Geo. 4*, c. 57, entitles "any person who shall be in actual custody within the walls of any prison, upon any process whatsoever, for or by reason of any debt, damages, costs," &c. to petition to be discharged from such custody. These words evidently include a prisoner in custody on a *capias utlagatum*, and this view is confirmed by s. 50, which enacts, that the discharge under the act shall extend to all process for contempt in non-payment of money or costs incurred in any Court. These sections therefore afford sufficient reason why the writ should not issue, even if it appeared, which it does not, that the commissioners were about to take any further proceeding. The only case which has been found on the subject is that of *Ex parte Battine* (b), by which it would seem that the power of this Court to grant prohibition to the Insolvent Debtors' Court at all, is very doubtful.

(a) Jan. 30th, before Lord Denman C. J., *Littledale*, *Williams*, and *Coleridge* Js.

(b) 4 B. & Ad. 690; S. C. 1 N. & M. 579.

*Crowder* contra. The question is, whether an outlaw can appear in Court on his own behalf, for any purpose whatsoever, except to reverse his outlawry. The authorities shew he cannot. He is not "within the law," *Co. Litt.* 122 b; *Vin. Abr.* Utlawry (X a); *Aldridge v. Buller* (a); *Loukes v. Holbeach* (b); *Griffith v. Middleton* (c). That last case shews that an outlaw is equally incapacitated to receive any benefit from the law, whether he sue as a plaintiff, or bring his *audita querela* as defendant. In *Ex parte Lawrence* (d), where the prisoner was in custody for a contempt of the Court of Chancery in not putting in an answer, and that Court, on application, refused to discharge him unless upon payment of his fees, the Court of Common Pleas refused to discharge him under the then Insolvent Debtors' Act, 34 *Geo.* 3, c. 69, because his contempt did not consist in the *non-payment of money*. The words in section 10 of the present statute are very similar to the enactment of that statute;—it shall be lawful for any person in custody, "upon any process whatsoever, for or by reason of any debt, damages, costs, &c., or for or by reason of any contempt of any Court whatsoever for non-payment of any sum of money," to petition for his discharge. A prisoner in custody on a *capias utlagatum* cannot be said to be in custody for non-payment of costs, or for contempt of Court in non-payment. *Beauchamp v. Tomkins* (e) is a strong authority to shew that bankruptcy and a certificate are no ground of discharge of a prisoner in custody on a *capias utlagatum*. If this is law, then the Insolvent Debtors' Court have no authority to discharge the prisoner, and prohibition lies; *Bac. Abr.* Prohibition (I). It has been said, that it does not appear that that Court is about to take any proceedings, but it is clear that the application of the prisoner to the Court is sufficient to ground prohibition; *Ex parte Smyth* (f). In *Ex parte Battine* (g) the applica-

1838.

The QUEEN  
v.  
The Insolvent  
Debtors'  
Court.

(a) 2 M. &amp; W. 412.

(e) 3 Taunt. 141

(b) 4 Bing. 419.

(f) 2 C. M. &amp; R. 748.

(c) Cro. Jac. 485.

(g) 4 B. &amp; Ad. 690; S.C. 1 N.

(d) 1 B. &amp; P. 477.

&amp; M. 579.

1838.  
  
 The QUEEN  
 v.  
 The Insolvent  
 Debtors'  
 Court.

tion was for a prohibition to the Insolvent Debtors' Court, against proceeding on an order made by them, and it did not appear that that Court was about to take any further steps. The order in question was made on December 13th, when this Court was not sitting, and therefore *Roberts v. Humby* (a) is in point, which shews that prohibition will issue after sentence, although the want of jurisdiction does not appear on the face of the proceedings, if the party has had no earlier opportunity of applying to the Court. He also cited *Grant v. Gould* (b).

Sir W. W. Follett cited *Castleman's* case (c), and *Dickson v. Baker* (d).

*Cur. adv. vult.*

LORD DENMAN C. J. on this day delivered the judgment of the Court.—A rule was obtained and has been argued in this case, to shew cause why prohibition should not go to the Insolvent Debtors' Court, prohibiting them from proceeding to discharge a defendant who has been outlawed in an action for criminal conversation, on the general ground that an outlaw cannot be heard in any Court, except for the single purpose of reversing his outlawry. And this is an undoubted rule of law, laid down in numerous cases and text books, the authority of which is fully recognized and was acted upon by the Court of Common Pleas in *Loukes v. Holbeach* (e). My brother *Park* there pronounced a learned judgment, affirming the principle, and applying it to a motion for setting aside an annuity in that Court granted by a person outlawed in the Court of King's Bench, in an action to recover arrears of that annuity. Whether the words of the Insolvent Debtors' Act (f), which were cited in the argument as creating an exception from the general rule, ought to have that effect, is the question

(a) 3 M. & W. 120.

(b) 2 H. Bl. 69.

(c) 4 Burr. 2119, 2127.

(d) 1 A. & E. 853; S. C. 3 N. & M. 774.

(e) 4 Biag. 419.

(f) 7 Geo. 4, c. 57, ss. 10, 50.

which we are now called upon to decide. But in truth we cannot consider it an open question. The words "by any process whatsoever," "by reason of any damages," are undeniably extensive enough to embrace a person outlawed in an action; whether it be an action of tort, or in debt or assumpsit, appears to make no difference in the case. There may be some ground for contending that persons outlawed were not in the contemplation of the act; but in Lord *Mansfield's* time this Court expressly declared its unanimous opinion on two different occasions (a), that an outlaw fell within the clause of the then existing act, the terms of which exactly corresponded with the present. We hold ourselves bound by that opinion, and think that we must discharge the present rule. In the case of *Loukes v. Holbeach* (b) no reference was made to the report in *Burrough*, which indeed could not have been brought to bear on the question there decided.

Rule discharged.

(a) 4 Burr. 2119, 2127.

(b) 4 Bing. 419.

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RAPHAEL and another v. GOODMAN.


Friday,  
June 8th.

**DEBT** on an indemnity bond given to the plaintiffs as sheriff of Middlesex, conditioned to save them harmless in the execution of a writ of fi. fa. against one *John Hayward*. The third plea alleged that the bond was obtained from the defendant by the plaintiffs and others in collusion with them, by fraud, covin, and misrepresentation. At the trial before *Coleridge J.* at the sittings in Middlesex after Michaelmas term 1836, it appeared that the plaintiffs having a writ of fi. fa. to execute against one *John Hayward* at the suit of the defendant, received notice that it was the intention of certain creditors to issue a fiat against *Hayward*, as he had committed an act of bankruptcy. The sheriff's officer thereupon obtained by fraud from the defendant an

1838.  
The QUEEN  
v.  
The Insolvent  
Debtors'  
Court.

1. A sheriff cannot recover on an indemnity bond which has been procured by the fraud of his own officer.  
2. A plea to an action on such a bond, that it was obtained by the sheriff and others in collusion with him by fraud and covin, is a good plea.

1838.

  
 RAPHAEL  
 and another  
 v.  
 GOODMAN.

indemnity bond previous to executing the writ. The plaintiffs then sold *Hayward's* goods, and paid the proceeds of the sale to the defendant, and were afterwards sued by the assignees of *Hayward*, who had become a bankrupt, for the seizure, and a verdict and damages were obtained against them. They now sought to recover the amount from the defendant under his bond. It did not appear that the plaintiffs were at all connected with the fraud, and the learned judge thought that the fraud of his officers was not sufficient to prove the plea, but he left it to the jury to say whether fraud had been practised, and on their finding a verdict for the defendant on that issue, he gave leave to the plaintiffs to enter a verdict for themselves.

Sir *F. Pollock*, in the Hilary term following, having obtained a rule accordingly on two grounds, first, that the sheriff could not be affected in this action by the fraud of his officers; secondly, that at all events it ought to have been pleaded specially;

*Thesiger* and *Ball* now shewed cause. Neither of the points made on obtaining the rule can be supported.

I. It has been held from the earliest times that the sheriff is responsible civilly, though not criminally, for the acts of his officers; *Laicoek's case* (a), *Woodgate v. Knatchbull* (b), *Sturmy v. Smith* (c), *North v. Miles* (d). If therefore he seeks to enforce an instrument obtained by their fraud, the law of principal and agent applies against him; *Fitzherbert v. Mather* (e), *Doe v. Martin*, per *Ashurst J.* (f). The case perhaps of *Crowder v. Long* (g) may be cited to shew that a sheriff is not liable for the fraud of his officer; but that case proceeded entirely on special circumstances, and the general rule was fully admitted by the Court.

II. It being clear therefore that the fraud of the sheriff's officer is legally the fraud of the sheriff, the proper mode is

(a) *Latch*, 187.

(b) 2 T. R. 148.

(c) 11 East, 25.

(d) 1 Camp. 389.

(e) 1 T. R. 12.

(f) 4 T. R. 68.

(g) 8 B. &amp; C. 598; S. C. 3 M.

&amp; R. 17.

to plead it as the fraud of the sheriff according to its legal effect; and it is doubtful whether it would be a good plea to state that the bond was obtained by the fraud of the sheriff's officer.

1838.

~  
RAPHAEL  
and another  
v.  
GOODMAN.

Sir *F. Pollock* and *Hoggins*, contra. There is no doubt that the sheriff is liable for the acts of his officers, but the question is, how is he liable? It is suggested that the fraud of the sheriff's officers could not be pleaded specially, but if the defence is a good one, what rule of law is there to prevent the facts being pleaded according to the truth. There is no authority whatever for saying that all that a sheriff's officer says or does may be described as the act of the sheriff. If his officers misconduct themselves in the execution of process, the sheriff is responsible, but if the fraud of the officer is relied upon as a defence to the action, it must be pleaded. The present issue is not supported by the evidence, for it is an averment against the facts. In *Woodgate v. Knatchbull* (a) the action was brought on the 29 Eliz. c. 4, and it appeared by the sheriff's return itself that greater fees had been taken than were allowed by the statute, the sheriff therefore was estopped from saying that the fees were taken by his officer and not by himself. But that case is no authority for holding that the fraud of the officer may be laid as the fraud of the sheriff. If his officer has committed a fraud, an action probably might be brought against the sheriff for misconduct, although *Crowder v. Long* (b) shews that, if the fraud took place between the execution creditor and the sheriff's officer, the execution creditor cannot charge the sheriff with the fraud. To make the sheriff responsible now, would be to make him answer for the fraud committed by another person.

Lord DENMAN C. J.—This is a case that offers no room for doubt. In all matters relating to the execution of writs the sheriff's officer is substantially the sheriff. This

(a) 2 T. R. 148.

(b) 8 B. &amp; C. 598; 5 C. 3 M. &amp; R. 17.

1838.

RAPHAEL  
and another  
v.  
GOODMAN.

is more particularly the case with regard to indemnity bonds, and we should depart from one of the most recognized principles of the law, if we were to hold that a sheriff could recover on an indemnity bond, which had been procured by the fraud of his officer.

LITLEDALE J.—The sheriff and his officer, in all matters relating to executions, are identified. The officers are appointed by the sheriff for his own convenience, and are the persons by whom practically all executions are made. All the cases shew that, if any thing irregular takes place, the sheriff is the person to be resorted to as the responsible party.

PATTESON J.—This is as clear a case as can be conceived. It is said that a sheriff ought not to be made responsible for another's fraud, but that is much better than to allow him to take advantage of another's fraud, that other being his own officer. It is a misinterpretation of the plea to suppose that it charges the sheriff personally with the fraud.


COLERIDGE J.—The civil responsibility of the sheriff for his officers does not seem to be disputed, but it is contended that the plea ought to have been framed differently. The sheriff, however, has many duties to perform, often at different places at the same time, and therefore he is forced to employ officers; but he is responsible for them, and therefore to hold that his responsibility may not be pleaded generally according to its legal effect, would be to depart from one of the fundamental rules of pleading.

Rule discharged.



## CORBETT v. SWINBURNE.

1838.

  
 Saturday,  
 June 9th.

**ASSUMPSIT.** First count, on a bill of exchange drawn by the defendant and indorsed to the plaintiff, and on an account stated. There were several special pleas, but the 3d and 5th are the only material pleas.

Third plea. As to the sum of 50*l.*, residue of the sum of money in the first count mentioned, and as to the 50*l.*, parcel of the sum of money in the last count mentioned, the defendant says that the plaintiff ought not *further* to maintain his action thereof against him, because he says (after an averment of the identity of the two sums of money in the introductory part of the plea above mentioned), that after the making of his said promise as to the said sum of 50*l.*, and after the commencement of this action, he the defendant indorsed and delivered to the plaintiff a certain bill of exchange made and drawn, to wit, on &c., by one &c., upon and accepted by certain persons, to wit &c., and made payable, to wit &c., for the sum of 82*l.* 10*s.*, in full satisfaction and discharge of the said promise of the defendant as to the said sum of 50*l.*, and of all *damages* by the plaintiff sustained by reason of the non-performance of the said promise, and which said bill he the plaintiff then took and received of and from the defendant in such full satisfaction and discharge as aforesaid, and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought *further* to maintain his aforesaid action thereof against him.

Fifth plea. As to the sum of 50*l.* in the 3d plea mentioned, and thereby pleaded to, the defendant says that the plaintiff ought not *further* to maintain his action thereof against him, because he says that after the making of his said promise relating to the said sum of 50*l.*, and after the commencement of this action, to wit, on &c., he the defendant paid to the plaintiff, and the plaintiff accepted and received of and from the defendant, the sum of 50*l.*, in full

A plea, against the further maintenance of the action, that since the commencement of the action to recover a sum of money the defendant had paid, and the plaintiff had received, the same in satisfaction of the defendant's promise, and of all damages, without the like allegation as to costs also, held good after verdict.

1838.

CONBETT  
v.  
SWINBURNE.

satisfaction and discharge of the said promise of the defendant as to the said sum of 50*l.* in the introductory part of this plea above mentioned, and of all *damages* sustained by the plaintiff by reason of the non-performance by the defendant of his said promise, and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought *further* to maintain his action thereof against him.

The replication traversed the above pleas.

At the trial before *Patteson J.* at the Middlesex sittings in Hilary term, 1837, a verdict was found for the defendant on all the issues except the first, which was, whether or not notice of dishonor had been given to the defendant.

*Platt*, in the same term, obtained a rule nisi to enter up judgment for the plaintiff *non obstante veredicto*, on the ground that the 3d and 5th pleas of accord and satisfaction, and of payment of the debt and damages, after the commencement of the action, did not afford any answer, because the plaintiff was entitled to satisfaction for costs also.

*Alexander and Busby*, shewed cause (*a*). The pleas afford a good defence against the further maintenance of the action, by shewing that the plaintiff has been fully satisfied in respect of the cause of action and the damages to which they are pleaded. The word "*damages*" includes the costs payable to the plaintiff for his writ; and even if it do not, the plaintiff should not have proceeded with his action, but should have entered a *nolle prosequi* as to the debt and damages. [*Patteson J.* Can a party submit to a judgment apparently against him, and yet have costs?] It is apprehended that he could, as these pleas are pleaded only against the *further* maintenance. The issue in this case is like the issue on a replication of damages *ultrâ* after a plea of payment of money into Court, when the plaintiff, if he fails, is not allowed his costs up to the time of the

(*a*) June 7, before Lord Denman C. J., *Littledale, Patteson, and Williams Js.*

plea. The pleas could not have been pleaded in bar generally; *Le Bret v. Papillon* (a) and *Hall v. Cole* (b).

1838.

CORBETT

v.  
SWINBURNE.

*Cottingham*, contra, contended that the allegation, that the damages had been satisfied, did not apply to costs, and that the pleas were therefore bad; and added, that he believed it had recently been decided in the Exchequer that the word "damages" in a plea of payment did not include costs.

*Cur. adv. vult.*

Lord DENMAN C.J. now delivered the judgment of the Court.—We are of opinion that the pleas in this case are good. They are pleaded in bar of the *further* maintenance of the action, and are not open to the objection taken in the case of *Le Bret v. Papillon* (a). They also state that the bills and the payment therein mentioned were accepted by the plaintiff in full satisfaction and discharge of the causes of action to which they are pleaded. They would have been good in that form if the transaction had been prior to the action, and they had been pleaded in bar generally; and we cannot see any reason why they are not equally good in the same form as a bar to the *further* maintenance. This being our opinion, it is unnecessary to notice the other matters which were discussed on the argument.

Rule discharged.

(a) 4 East, 502.

(b) 4 Ad. & El. 577; S. C. 6 N. & M. 124.

### BLUNT v. HESLOP.

Saturday,  
June 9th.

**ASSUMPSIT** to recover the amount of an attorney's bill.

Plea, that the action was commenced in less than a month after the delivery of a signed bill of costs.

The month required to elapse after the delivery of his bill, before an

attorney can commence an action for its amount, under 2 Geo. 2, c. 23, s. 23, must consist of 28 days, exclusively of both the day of delivering the bill and of commencing the action.

1838.

BLUNT  
v.  
HESLOP.

The replication traversed this plea.

On the trial before Lord Denman C.J. at the sittings after Michaelmas term, 1836, it appeared that the bill had been delivered on the 12th January, 1836, and the action was commenced on the 9th February following, so that a full month had not intervened from the delivery of the bill, according to 2 Geo. 2, c. 23, s. 23, unless one of those days could be included in the computation; and the objection having been taken that the action was brought too soon, his lordship directed a verdict for the plaintiff, and reserved leave to the defendant to move to enter a nonsuit.

*Alexander*, in Hilary term, 1836, having obtained a rule nisi,

*Channell* now shewed cause. A month from the delivery of the bill had expired before action, according to the principle of computation, which is now established by many authorities, that, where the computation is to be made from an act done, the day on which the act is done is to be included, especially as against a party privy to the act: *Clayton's case* (a), *Rex v. Adderley* (b), *Castle v. Burditt* (c), *Glassington v. Rawlins* (d). It may be said that the bill of costs may be delivered at a person's place of abode, and that therefore the delivery is not necessarily an act to which he is privy. The same observation, however, will apply to notice of action, the day of which is computed inclusively; *Castle v. Burditt* (c). In *Lester v. Garland* (e), which may be cited on the other side, the Master of the Rolls instances notice of action as an act to which the party receiving notice is necessarily privy, and therefore as dissimilar in that respect to the event there computed from, namely, the death of a testator. That case, therefore, is in favour of the plaintiff. On the same ground also it was held, in *Pellew v. The Inhabitants of Wonford* (f), that the two

(a) 5 Rep. 1.

(b) 2 Doug. 463.

(c) 3 T. R. 623.

(d) 3 East, 407.

(e) 15 Ves. 248.

(f) 9 B. &amp; C. 134; S. C. 4 M. &amp; R. 130.

days' notice to the hundred of the plaintiff's premises having been maliciously fired, were to be reckoned exclusively of the day when the fire happened; Lord *Tenterden* C.J. observing, that the computation was to be made from an act not done by the party, and of which he might at the time be wholly ignorant. The same principle of computation is recognised in *Hurdy v. Ryle* (a), although there may be difficulty in reconciling with it the decision, that the day of the plaintiff's imprisonment, which was the act computed from, was to be excluded from the six months within which he was required to commence his action against a justice for false imprisonment. *Ex parte Farquhar* (b) also, and *Godson v. Sanctuary* (c), are in favour of the plaintiff. In those cases the two months, which must elapse between certain acts and a commission of bankruptcy, in order to validate such acts, were reckoned inclusively of the day of the acts done. In *Webb v. Fairmaner* (d), it has very recently been held, that where goods were sold, to be paid for in two months, the day of the sale was not to be included; but in that case neither of the authorities last cited was brought to the attention of the Court.

1838.  
BLUNT  
v.  
HESLOP.

*Alexander*, contra. Most of the cases cited for the plaintiff are founded upon *Rex v. Adderley* (e), a decision upon the 20 Geo. 2, c. 37, s. 2, which is very distinguishable in its language from the statute now under consideration. The 20 Geo. 2, c. 37, s. 2, enacts that the sheriff shall not be called upon to return any process, unless he be required to do so *within* six months after the expiration of his office. But the 2 Geo. 2, c. 23, s. 23, says, that no attorney or solicitor shall commence an action for his bill "until the expiration of one month or *more* after such attorney or solicitor respectively shall have delivered," &c. The word "within" does not occur in this statute; but

(a) 9 B. & C. 603; S. C. 4 M. & R. 295.

(b) 1 Mont. & Mac. 7.

(c) 4 B. & Ad. 255; S. C. 1 N. & M. 52.

(d) 3 M. & W. 473.

(e) 2 Doug. 463.

1838.

BLUNT

v.

HESLOP.

even where the word "within" is found, the computation is sometimes exclusive; as where a patent bore date the 10th of May, and contained the usual proviso that a specification should be inrolled "*within* one calendar month next and immediately after the date thereof," an inrolment of the 10th of June was held to be in time; *Watson v. Pears*(a). Many other cases of the same construction may be mentioned, and among them *Pellew v. Wonford*(b), which has been cited for the plaintiff. *Webb v. Fairmaner*(c) is a case where so many months were stipulated for without any words, such as "within" and "or more," to modify them, and the day of the act done was excluded: and *Rex v. The Justices of Cumberland*(d) is another case of the same character. But the words in the statute of 2 Geo. 2, c. 23, s. 23, "one month or more," mean one month "at least;" and the effect of these last words is, that a clear month must be given exclusively both of the day of delivering the bill and commencing the action; *Regina v. The Justices of Salop*(e), and *Zouch v. Empsey*(f). According to the argument on the other side, if the statute had said that the action should not be commenced until the expiration of one day after the delivery, it might be commenced immediately. "It was the intention of the statute that the client should have due time to examine the charges made by the attorney, and take advice upon them if necessary:" *Brooks v. Mason*(g).

LORD DENMAN C. J.—The defendant cannot have the benefit of the statute unless a clear month be allowed him; and any odd hours of the day on which the bill is delivered must be given in.

LITLEDALE J.—The words "until the expiration of one month or more," must mean an entire month.

PATTESON and WILLIAMS Js. concurred.

Rule absolute.

(a) 2 Campb. 294.

(d) 4 Nev. & M. 378.

(b) 9 B. & C. 134; S. C. 4 M.

(e) *Ante*, 286.

& R. 130.

(f) 4 B. & Ald. 522.

(c) 3 Mees. & W. 473.

(g) 1 H. Bl. 290.

1838.

DOE *d.* BRIDGER *v.* WHITEHEAD.

*Saturday,  
June 9th.*

**EJECTMENT** for premises near Bethnal Green. At the trial before *Littledale J.* at the Middlesex sittings after Michaelmas term, 1836, the plaintiff claimed as landlord for a forfeiture on account of the defendant's breach of covenant to insure, and also to repair. The covenant to insure was general: it was proved, that in November, 1834, the defendant was requested by the plaintiff to produce his policy of insurance, and that he declined to do so. Notice was also given to the defendant to produce the policy at the trial, but he did not comply with the notice. The learned judge was of opinion that the defendant was bound to prove the affirmative, that he had insured the premises, but left to the jury the evidence on this point, as well as evidence which was given to shew the state of repair, and a verdict was found for the defendant.

In ejectment for not insuring according to covenant, it lies upon the plaintiff to prove that no insurance has been effected, and the circumstance that defendant refused to shew the policy, when the plaintiff required him, and the non-production of it at the trial, after notice, are not *prima facie* evidence against him.

*Platt*, in the following term, obtained a rule nisi for a new trial, on the ground that the verdict was against evidence.

*Seemle*, per *Littledale J.*, that if it had been an action of covenant merely, the onus would have been cast on the defendant.

*Kelly* now shewed cause, and contended that the Court could not disturb the finding of the jury as to either forfeiture; and that with regard to the forfeiture for not insuring, it lay on the lessor of the plaintiff to make out his own case.

*Platt* and *Peacock*, *contra*.—Although the general rule is that, where the negative of the issue involves a charge of culpable omission, it is incumbent upon the party making the charge to prove it, yet where the affirmative is peculiarly within the knowledge of the party charged, as in this case, the presumption of law in his favour does not operate, and the more general rule obtains, that he who asserts the affirmative of the issue must prove it. The defendant not having covenanted to insure in any particular office, it would be

1858.  
  
 DOX  
 &  
 BRIDGES  
 v.  
 WHITEHEAD.

almost impossible to prove that he had not insured, whereas he might prove the affirmative without any difficulty. The rule of pleading applicable to this subject is laid down in *Spieres v. Parker* (a), but there are several direct authorities upon the very question before the Court, as to the onus of proof in cases like the present. In *Rex v. Stone* (b) the Court were divided, but in *Rex v. Turner* (c) it was expressly held that, on an information against a person for having game in his possession, without being properly qualified under the Game Acts, it lay upon him to prove his qualification. So, in a penal action against the defendant for practising as an apothecary without a certificate, *Abbott C. J.* ruled that it lay upon him to shew that he had a certificate; *Apothecaries Company v. Bentley* (d). If any *prima facie* evidence on the part of the plaintiff was requisite, the very circumstance that the defendant did not produce his policy in Court, after notice to do so, was sufficient to raise a presumption against him; just as it is to be presumed that an agreement is properly stamped against a party, who refuses, after notice, to produce it; *Crisp v. Anderson* (e).

**LORD DENMAN C. J.**—In an action like the present for a forfeiture, I do not think that the non-production of the policy, after notice, should be taken even as *prima facie* evidence against the defendant that he had not insured. The defendant is in possession of an estate, and ought not to be deprived of it on the ground that it has become vested in the plaintiff by a forfeiture, until it is shewn how a forfeiture has been incurred. It is not necessary to dispute the authority of the cases cited, where penalties have been imposed on persons for doing certain acts, without the necessary qualification, although no evidence was given that such qualification was not possessed by them; because in those

(a) 1 T. R. 141.


(b) 1 East, 639.

(c) 5 M. & S. 206.

(d) Ry. & Moo. 159.

(e) 1 Stark. C. 35.

cases all persons generally are prohibited from doing the acts in question, unless they have an authority. In this case, no doubt, the plaintiff would have had very great difficulty in proving that the defendant had not insured. But this difficulty the plaintiff has brought upon himself, for he might have made it part of the contract, that the defendant should insure in some particular office, or that he should produce his policy when called upon. He has however chosen to make the forfeiture depend on a condition peculiarly within the knowledge of the defendant, and has therefore brought the difficulty upon himself. With regard to the other alleged forfeiture, the evidence in support of it was certainly strong, but we will not disturb the verdict.

1832.  
  
 Don  
 d.  
 BRIDGER  
 v.  
 WHITEHEAD.

LITLEDAL J.—I am of the same opinion. The cases cited are distinguishable; where the law says that no man shall be allowed to do a certain act, unless he has a specified qualification, it lies upon the party doing such an act to justify it by shewing his qualification. Here an estate has been granted by a person who wishes to defeat it on the ground of forfeiture; but before he can be allowed to do that, he should shew that a forfeiture has been committed. In an action of covenant for not insuring, perhaps it might be for the defendant to prove affirmatively that he had insured, but not in an action like the present for a forfeiture. The non-production of an instrument, after notice, is not in itself evidence, but merely lets in other evidence of a secondary nature.

PATTESON and WILLIAMS Js. concurred.

Rule discharged (a).

(a) See also *Don d. Chandless v. Robson*, 2 C. & P. 245, where Abbott C. J. observed, "In all cases of forfeiture, the lessor of the plain-

tiff must give some negative evidence that the thing has not been done."

1838.

Monday,  
June 11th.

In trespass for breaking and entering a dwelling, and seizing and taking away divers goods and chattels there being, the defendant pleaded that the house was not the plaintiff's, nor the goods, his goods; at the trial the contest was as to the right to the goods; the jury found that the house and part of the goods belonged to the plaintiff; the plaintiff having entered the *posse* for himself, the Court ruled that the issue as to the goods was divisible, and ordered the *posse* to be amended by entering it for the defendant, as to those goods which were found not to be the property of the plaintiff.

ROUTLEDGE v. ABBOTT and others.

**TRESPASS** for breaking and entering the plaintiff's dwelling-house, and for seizing and taking away divers goods and chattels, to wit &c., there found and being in the said dwelling-house. Pleas:—1, not guilty; 2, that the dwelling-house was not the dwelling-house of the plaintiff, nor the goods &c. the goods of the plaintiff; 3, as to seizing and taking the goods &c., a fiat of bankruptcy issued out against one *Francis Knowles*, whereupon the defendant *Abbott* was appointed official assignee, and that the goods and chattels in the declaration mentioned were the goods &c. of the said bankrupt, and that the defendants seized them under the warrant of the commissioner of bankrupts. At the trial in London, at the sittings after Michaelmas term, 1837, before Lord *Denman* C. J. it appeared that the plaintiff, in December, 1835, took an inn called the City Hotel, in Cheapside, and laid in a large stock of furniture suitable for an hotel, which were the goods and chattels mentioned in the declaration, and which had been seized by the defendants under the commission of bankruptcy against *Knowles*, who had formerly kept the Blossoms Inn, and against whom a fiat of bankruptcy had been issued in July, 1835. The defendants' case at the trial was, that the City Hotel had in reality been taken by *Knowles*, who, not having obtained his certificate, had put forward the plaintiff as the ostensible owner, and that all the goods contained therein had been obtained on *Knowles'* credit, and been paid for by *Knowles*. Evidence was given by the plaintiff to shew that he alone had taken the house, and some of the goods mentioned in the declaration were proved to have belonged to the plaintiff before he came to the City Hotel, to which he had removed them from his former residence at Camberwell. The jury found that the house and fixtures belonged to the plaintiff, and also the furniture brought by the plaintiff from Camberwell, but they

found that the goods bought for the City Hotel belonged to *Knowles*, and they gave 100*l.* damages.

The plaintiff on this finding having entered the *postea* on all the issues for himself, Sir *F. Pollock*, in Easter term, 1837, obtained a rule nisi for amending the *postea*, in conformity with the finding of the jury (*a*).

1838.

ROUTLEDGE  
v.  
ABBOTT  
and others.

Sir *W. W. Follett* now shewed cause.—It is contended that the defendant is entitled to the costs on so much of the issue on the second plea, as relates to the goods of the bankrupt *Knowles*. But that is not so. The rule Hil. 2 Will. 4, r. 74, entitles the defendant to the costs of all issues found for the defendant. But the second issue in this case is found for the plaintiff. That issue was, that the house was not the house, and that the goods were not the goods, of the plaintiff. The jury have found that they were. It is quite immaterial whether the whole of the goods are the goods of the plaintiff. The declaration complains of an injury to the plaintiff's property, and the injury proved to those goods which belong to the plaintiff is that for which he is entitled to recover. Suppose the action had been trover for 200 boxes, and that the plaintiff had proved himself entitled to 100, and had offered no evidence as to the remainder, the issue must have been found for the plaintiff. So in the case of a libel, when the plaintiff proves some parts of the libel, he is entitled to a verdict on the whole count. It is impossible, therefore, to say that the issue on the second plea is divisible. [*Patteson J.* In *Bowen v. Jenkins* (*b*), which was case for disturbance of common, where the defendant justified under a right of common for all his cattle levant and couchant, and the plaintiff in his replication traversed that all the cattle were the defendant's commonable cattle

(*a*) In the affidavit of the plaintiff's attorney it was sworn, that the verdict of the jury was believed to be in writing to the following effect:—"The jury find that the house and fixtures belong

to the plaintiff, and that the furniture bought by the plaintiff also belongs to him, and we find for the plaintiff, damages, 100*l.*"

(*b*) 2 N. & P. 87.

1838.  
  
 ROUTLEDGE  
 &  
 ABBOTT  
 and others.

levant and couchant; I ruled at the trial that, as the defendant proved a right to turn on his cattle levant and couchant, the plaintiff could not prove a surcharge, without having a new assignment. When the case was considered in this Court, the ruling was confirmed, on the ground that, as the number of the cattle was not material in the declaration, and the defendant had shewn a right to turn on a certain quantity, he had a right to apply that proof to the general allegation in the declaration.] That seems to be an authority for the plaintiff in the present case. The number of the goods here is immaterial; the plaintiff alleges a trespass with respect to his goods, and he proves a trespass committed. Suppose the count was in trespass for 200 bales of goods, and the plaintiff recovered as to 10, there is no issue as to the remaining 190. [*Littledale J.* When the defendant proved that half of the goods belong to *Knowles*, had he not proved that part of his plea?] If he had pleaded that part of the goods were the goods of *Knowles*, it might have been so, but that would have been a bad plea. On the present issue, as the plaintiff proved part of the goods to be his, it is quite immaterial that another part belonged to other persons.

*Sir F. Pollock*, (with whom was *Butt*), contrà. This is not a mere action of trespass for breaking and entering a dwelling-house, but it is trespass to a house and goods, and in such case, if the jury find for the plaintiff as to the house, but not as to the goods, it is clear on principle that the verdict on the issue as to the goods should be entered for the defendant. In this case, although the question relates as to the goods only, the issues are quite as distinct. [*Lord Denman C.J.* Without doubt, the main contest at the trial was as to which party was entitled to the goods.] On the main point, the defendant succeeded, he is therefore clearly entitled to have the verdict entered for him. The finding of the jury, perhaps in point of form, is not quite correct, but it is for the Court to have the entry made according to the

meaning of that finding. In *Doe v. Errington* (a), where the plea was only not guilty, that plea was held divisible. So in *Prudhomme v. Fraser* (b), where the declaration contained a number of causes of action for libel, to which not guilty was pleaded, and the jury negatived the greater part of the libel, it was held that the plea of not guilty raised distinct issues on the different allegations in the declaration, and that the plaintiff was entitled to the costs only of such parts of the declaration as were found by the plaintiff to apply to him. *Cox v. Thomason* (c) also decided that the general issue, pleaded to a declaration containing several counts, raised distinct issues upon each count. It has been said that, if the plaintiff brought trespass for 200 bales of goods, and offered no evidence as to 190, there would be no issue except as to ten bales; but that is not so, for in *Phythian v. White* (d), where the plaintiff brought trespass for breaking and entering three closes, and the defendant justified as to all the closes, and the plaintiff offered no evidence as to one of them, it was held that the issue was divisible, and that the defendant was entitled to the verdict as to that close. (He was then stopped by the Court.)

Per CURIAM (e).—The issues on the second and third pleas are certainly divisible; the verdict therefore must be entered for the plaintiff on not guilty, and distributively on the second and third issues.

Rule absolute.

(a) 4 Dowl. P. C. 602.

(b) 4 N. & M. 512.

(c) 2 C. & J. 498; S. C. 1 Dowl. P. C. 572.

(d) 4 Dowl. P. C. 714; S. C.

1 M. & W. 216.

(e) Lord Denman C. J., *Littledale, Patteson, and Williams, Js.*

1838.

Monday,  
June 11th.

PURSELL v. HORNE and ELIZABETH his wife.

1. Throwing water on a person is a battery.

2. Where a declaration charged the defendant with assaulting the plaintiff, and throwing water upon him, and also with wetting, damaging, and spoiling his clothes, and the defendant pleaded, as to the assaulting, and wetting, damaging and spoiling the clothes, a justification, and to the residue of the trespasses, not guilty:—Held that, as the wetting of the clothes was not necessarily a battery, there was no justification of the battery; so that the judge, who tried the cause, might have certified, under 22 & 23 Car. 2, c. 9, that the battery was proved, and that, as he had not done so, the plaintiff, who had recovered less than forty shillings damages, was not entitled to costs.

THE declaration stated, that the said *Elizabeth*, on the 1st November, 1836, with force and violence assaulted the plaintiff, and then cast and threw divers large quantities of boiling water on the plaintiff, and also then wetted, damaged, and spoiled the clothes and wearing apparel of the plaintiff, to wit, &c., which the plaintiff then wore and was clothed with, by means of which &c. the plaintiff was then greatly hurt, scalded, and wounded, &c. First plea: as to the assaulting the said plaintiff as in the declaration mentioned; and wetting, damaging, and spoiling the said clothes and wearing apparel, *son assault demesne*. Second plea: to the residue of the trespasses, not guilty.

At the trial of this cause at the Northamptonshire Spring assizes, 1837, before *Littledale J.*, the verdict passed for the plaintiff, damages one farthing. The learned judge refused to certify and deprive the plaintiff of costs under the 48 Eliz. c. 6. The associate having thereupon indorsed the *postea*, with 40s. costs, *Waddington*, in Trinity term last, obtained a rule, calling upon the plaintiff to shew cause why the *postea* should not be amended, by substituting one farthing costs for forty shillings.

*Humfrey* now shewed cause. I. The plaintiff is entitled to his full costs. The 22 & 23 Car. 2, c. 9, s. 136, does not operate to deprive a plaintiff of his costs, unless there be a battery as well as an assault. Now it is laid down in *Comyn (a)* that throwing water upon a person is not a battery, but only an assault. There was a case tried at Coventry, before *Alexander C. B.*, where the defendant threw a glass bottle at the plaintiff, and it was held to be no battery. II. If it is a battery, there is a justification

(a) Com. Dig. Battery (C).

pleaded on the record, which has always been held to prevent the operation of the statute (a).

1838.

PURSELL

v.

HORNE

*Waddington*, contra. I. The law laid down by *Comyn* evidently refers to cases where water &c., is thrown *at*, and not *on* the plaintiff. All the instances collected in that section are only exemplifications of the first proposition, "If a man strike *at* another, and do not touch him, it is no battery, but will be an assault." [Lord *Denman* C. J. The Court are satisfied on this point.]


II. Part of the trespass, then, being a battery, there is no justification of it. The plea studiously separates the charges of throwing the boiling water on the plaintiff, and the assaulting and wetting him, and damaging his clothes; and it only justifies the latter charges, pleading not guilty to the former. The gist of the action is the assault and the battery; the wetting and damaging the clothes is justified as if mere aggravation of the *assault*. In *Bannister v. Fisher* (b), where the declaration charged that the defendant assaulted the plaintiff, and with a stick struck him many blows, and then and there, with the said stick, struck a certain horse, on which the plaintiff was riding, many blows, and the verdict passed for the plaintiff, with 5s. damages; it was contended that the striking the horse was an independent assault, and therefore that the case was not within the 22 & 23 Car. 2.; but the Court held that, the whole being in one count, the striking the horse was ancillary to the gist of the action, which was the assault and battery, and therefore that it was within the statute. The same point was ruled in *Mears v. Greenaway* (c), where wetting and tearing the clothes was charged in addition to the assault and battery, and it was held to be merely ancillary; and *Hamson v. Adshad* (d) is to the same effect. In this case, the wetting and damaging the clothes is not justified as if consequential from

(a) See the cases collected in a note of Sir *W. Evans*, in his Collection of Statutes, 3 *Evans's Stat.* 301-2.

(b) 1 Taunt. 357.

(c) 1 H. Bl. 291.

(d) Bull. N. P. 339.

1838.  
  
 PURSELL  
 v.  
 HORNE.

the *battery*, but from the *assault*. All formed part of one transaction undoubtedly, but it is easy to conceive that the plaintiff might get his clothes wet and torn without any battery being committed.

LORD DENMAN C. J.—I think a battery cannot mean merely an injury inflicted by an instrument held in the hand, *cominus* as it were, but includes all cases where a party is struck by any missile thrown by another. That being so, I think there is no justification of the battery on this record.

LITLEDALE J.—Unless we were to hold that throwing boiling water on a person is not a battery, the wounding a person with a ball from a pistol, under circumstances not amounting to a felony, would not be a battery.

PATTESON J.—The justification is certainly as to the assault only, for the wetting and damaging the clothes, or *laceravit*, as it is called, does not necessarily amount to a battery.

WILLIAMS J. concurred.

Rule absolute (a).

(a) "It seems that any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or any way

touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law." 1 Hawk. B. 1, c. 15, p. 110, 8th ed.



1838.

Monday,  
June 11th.

THOMAS v. DAVIES.


**TRESPASS** for breaking and entering the plaintiff's messuage or dwelling-house, in the parish of Llanelly, and for there seizing and taking away a signboard affixed to the said dwelling-house. Pleas:—1, not guilty; 2, that the messuage or dwelling-house, and the signboard thereto attached, were not the messuage &c. of the plaintiff; 3, that the signboard mentioned in the declaration was affixed to the dwelling-house mentioned in the declaration, and that the dwelling-house was the soil and freehold of the defendant. Replication,—that the defendant had demised the said dwelling-house to the plaintiff for a year, and so on from year to year, &c., and that the defendant entered into the said dwelling-house during the continuance of the said demise. Rejoinder,—that the defendant did not demise to the plaintiff *modo et formâ*.

At the trial at the Breconshire assizes, before *Coleridge J.*, the jury found a verdict for the plaintiff, damages twenty shillings; and the learned judge certified, under 43 *Eliz.* c. 6, to deprive the plaintiff of costs.

*J. Evans* having obtained a rule calling upon the defendant to shew cause why the Master should not tax full costs to the plaintiff, notwithstanding the certificate,

Trespass for breaking and entering a dwelling-house. Pleas: 1, not guilty; 2, that the messuage was not the messuage of the plaintiff; 3, *liberum tenementum*. Replication, that the defendant had demised to the plaintiff, and broke and entered during the demise. The plaintiff obtained a verdict, with 1*l.* damages, and the judge certified under the 43 *Eliz.* c. 6:—Held, that the plaintiff was entitled to full costs notwithstanding.

*Chilton* now shewed cause, and contended, that in order to give effect to the 22 & 23 *Car.* 2, c. 9, the several decisions ruling that a plea of licence, or other justification, to trespass *quare clausum fregit*, take the case out of the statute, ought to be overruled. [*Patteson J.* The question has just received a very elaborate discussion in *Purnell v. Young (a)*.] It is admitted that the current of decisions is opposed to putting the correct construction on the statute of *Charles*, but the attention of the Court has never been

1838.  
  
 THOMAS  
 v.  
 DAVIES.

called to the marked distinction in language between the 43 *Eliz.* c. 6, and the 22 & 23 *Car.* 2, c. 9. The former statute entitled the plaintiff to full costs in all cases where he recovered a verdict, if the most minute interest in land was in question; but by the 22 & 23 *Car.* 2, c. 9, the judge is directed to certify that the title "was chiefly in question," in order to entitle the plaintiff to full costs if the jury found less than forty shillings damages. The intention of the legislature evidently was to discourage frivolous actions, by depriving the plaintiff of costs in all personal actions if he recovered less than that amount, and unless the judge certified. He then cited *Hughes v. Hughes* (a), *Smith v. Edwards* (b), *Dunnage v. Kemble* (c), and *Howell v. Thomas* (d).

*J. Evans*, contra, was not called upon.

Lord DENMAN C. J.—Mr. *Chitty*, in his edition of the statutes, animadverts upon the construction which has been placed upon the statute of *Charles*, and disapprobation of it has from time to time been expressed by the bench; but after so many decisions establishing the rule, we are not at liberty to depart from it.

LITTLEDALE, PATTESON and WILLIAMS Js. concurred.

Rule absolute (e).

(a) 2 C. M. & R. 668.

(b) 4 Dowl. P. C. 621.

(c) 3 Bing. N. C. 538.

(d) 7 Carr. & P. 342.

(e) See *Pugh v. Roberts*, 3 M. & W. 458.



**The QUEEN v. The Lady HENRIETTA BARBARA MANNERS SUTTON and others.**

1836.

Monday,  
June 13th.

**INDICTMENT** for the non-repair of Kelham Bridge, in the county of Nottingham, upon an alleged liability to repair *ratione tenuræ* (a). At the trial before *Bosanquet J.* at the Warwick Lent assizes, 1836, the defendants, in answer to a *prima facie* case brought against them on the part of the crown, tendered in evidence a record of the Court of Exchequer, Hil. 18 *Ed. 3*, produced from the treasury of the Court of Exchequer, by which it appeared that the men of Kelham had presented the Bishop of Lincoln for the non-repairs of Kelham Bridge, and that upon a trial had the jury negatived the liability of the Bishop; and the jury, upon being asked who of right was bound to repair the bridge, said that they were wholly ignorant; and they also found that the bridge had been built about sixty years: the reception of this evidence was objected to on behalf of the crown, but was admitted by the learned judge as shewing a *lis mota* at the time.

The record in question set out a writ of certiorari to the sheriff of Nottingham, to bring up certain presentments of the Bishop of Lincoln for the non-repair of Kelham Bridge. The presentment was as follows:—

“Kelum. The township of Kelum presents that the Bishop of Lincoln ought and was accustomed to repair the bridge of Kelum, which is ruinous and broken, in default of the said Bishop, to the damage of the men passing by the said bridge.”

The bishop pleaded, that neither he nor his predecessors had at any time repaired the aforesaid bridge, nor are they bound to repair or sustain the bridge; of which he put himself upon the country; and *John de Lincoln*, who sued for the king, did the like. (The record then set out an award of *nisi prius* to Retford, in Nottinghamshire, and

1. On an indictment for the non-repair of a bridge *ratione tenuræ*, held that a record of 18 *Edw. 3*, setting out a presentment of the Bishop of Lincoln for non-repair of the bridge, and his acquittal by the jury, which was shortly after followed by a grant of pontage from the crown, on the ground that it had been found by inquest that no one was liable to repair the bridge, is admissible in evidence to negative any immemorial liability *ratione tenuræ*.

2. The jury, after finding a verdict of acquittal, also found that the bridge had been recently built, and that no one was liable to repair it; *semble*, that such finding by a jury, in ancient times, is admissible as reputation, on a question as to

(a) See the former case, 5 N. & M. 353.

the liability to repair *ratione tenuræ*.

1838.  
  
 The QUEEN  
 v.  
 Lady  
 H. SUTTON  
 and others.

that the verdict of the jury was thereupon taken in these words,) " the aforesaid bishop or his predecessors have never repaired the aforesaid bridge, nor are they bound of right to repair or sustain the said bridge. The same jurors being asked if there is any bridge at the aforesaid town of Kelm, they say there is : also being asked who of right are or is bound to repair and sustain the bridge aforesaid, they say that they are wholly ignorant : also being asked at what time and by whom the bridge aforesaid was first constructed or repaired, they said that about sixty years past, and then from the alms of the men of the county passing there ; and in the construction and reparation of the bridge aforesaid came one *Oliver*, heretofore Bishop of Lincoln, the predecessor of the said bishop who now is, passing through the country, and of his own alms charitably contributed to the work of the aforesaid bridge 40s., and in no other manner." Ideo consideratum est, &c. The defendants then produced from the records of the Tower a writ of privy seal, dated June 28th, in the same year of the record, " which willed that the bridge of Kelham was dangerous, and that no one was bound to repair it, as was found by inquest," and directed a grant of pontage for reparation of the same to be made under the great seal to the men of Kelham. They also produced the grant of pontage made accordingly, dated August 12th, in the same year. Upon these facts the verdicts passed for the defendants. Sir *F. Pollock*, in the ensuing Easter term, obtained a rule nisi for a new trial, or to stay the entry of judgment on the above verdict until the Court should further order, on the ground that the record was improperly admitted as evidence of reputation, and he cited *Rex v. Antrobus* (a).

Sir *J. Campbell A. G.*, *Adams* Serjt. and *Starkie*, in Hilary term (b) last, shewed cause. I. The objection now made is, that the record was irrelevant, as it was im-

(a) 4 N. & M. 565.

(b) January 22nd, before Lord  
*Denman C. J.*, *Littledale*, *Williams*

and *Coleridge* Js. The case had  
 been in part argued in Michaelmas  
 term last.

material whether there had been any *lis mota* in the time of *Edw. 3*, or not. This objection was not made at the trial, but it is not sustainable; for as the charge is made on the defendants *ratione tenuræ*, it is important to shew that in that reign it was a *vexata questio*. The issue at the trial being whether the defendants' liability existed since the time of legal memory, the inference naturally arises, that if the owners of the Kelham estate had been so liable they would have been proceeded against then. The value of the evidence upon this point is another question, but that is for the jury alone; as in *Rex v. The Inhabitants of Northampton (a)*, where a county was indicted for the non-repair of a public bridge; it was held, that the defendants were entitled to give in evidence under not guilty the fact of the bridge having been repaired by private individuals, although Lord *Ellenborough* C. J. remarked on the little value of such evidence standing by itself. But if it is competent to a county to give evidence of repairs done by private individuals, *à fortiori*, on a charge of liability *ratione tenuræ*, the defendant must be allowed to prove that the public prosecutor, (for *John de Lincoln* appears to have been the clerk of assize,) had made the charge against other persons. Suppose the Bishop of Lincoln had been found guilty on the presentment for the non-repairs, would it not have been almost conclusive evidence in favour of the defendants on the present indictment? Yet it would be open to the same objection of being *res inter alios acta*. II. The record is evidence as connected with the grant of pontage, which refers to the inquest, and which therefore entitles it to be read. III. It is also evidence as the solemn presentment of twelve men on their oaths. Jurors anciently were more in the nature of witnesses than of judges of facts to be brought before them, and the old law attributed the highest weight to their finding (*b*). Thus it is laid down in 2 *Hawk. B. 2*,

1838.  
  
 The QUEEN  
 v.  
 Lady  
 H. SUTTON  
 and others.

(a) 2 M. & S. 262.

(b) The 6 *Hen. 6*, c. 2, enacted  
 that panels of assizes be delivered

by the sheriff to either party six  
 days before the session of the jus-  
 tices, in order that they might

1838.

The QUEEN  
v.Lady  
H. SUTTON  
and others.

c. 9, "as to the third particular, viz. what high credit the law gives to an inquisition of death found before a coroner, it seems certain that anciently the judge would not receive a verdict acquitting a person of the death of a man found against him by a coroner's inquest, unless the jury so acquitting the defendant had found at the same time what other person did the fact, or by what other means the party came to his death; because it appeared by the coroner's view upon record, that a person was killed." So in *Rex v. Jolliffe* (a) *Buller*, J. laid down that, "Lord *Hale*, and every other crown lawyer, state, that if to an action for slander, in charging the plaintiff with felony, a justification be pleaded, which is found by the jury, that of itself amounts to an indictment, . . . inasmuch as it is found by a jury of twelve men (b)." *Hale* also lays down (c) that, "by the ancient law the jury that acquits, whether upon a presentment or upon an indictment of homicide, shall be chased (forced) to say who did the fact; 37 Ass. 13." These authorities shew that the jury were strictly performing their duties in the answers they made to the Court. It is also to be observed, that the answers of the jury were against their own interest, for by declaring they did not know who were liable they brought the burden of repairing upon themselves as inhabitants of the county. The question then is, was the repair of the bridge a matter of public interest? for if so, the record is also admissible as reputation, on the ground that whenever reputation is admissible a verdict is admissible; *Reed v. Jackson* (d). *Rex v. Antrobus* (e) may be cited contra on account of a dictum of *Patteson* J., but that was merely an extra-judicial opinion of the learned judge. The distinction between the public and private rights on which reputation is or is not admissible is not

inform the jurors of their right and title before the assizes.

(a) 4 T. R. 285.

(b) The passage in Sir *M. Hale* is, 2 P. C. 151, and he cites 13 Ass. 6, 18 *Ed.* 3, 32 a; *Stamf.*

P. C. f. 94 b, for similar instances.

(c) 2 Hale P. C. 300.

(d) 1 East, 355. See also *Brisco v. Lomas*, ante, p. 308.

(e) 2 A. & E. 794.

very distinctly marked. *Weeks v. Sparke* (a) is an instance of the admissibility of reputation as evidence on a right of common, which is in the nature of a private right; but the judgment of the Court points out the right ground of its admissibility, viz. that, when the private right is of a general character such as to affect a multitude of persons, reputation is admissible. The repair of a county bridge is a matter of public interest, and therefore the evidence is admissible either to establish the charge, *Rogers v. Wood* (b), *Morewood v. Wood* (c), *Outram v. Morewood* (d), or to disprove it, *Drinkwater v. Porter* (e). *Phill. on Ev.* 250, et seq. (8th edit.) And as the jurors came from Bedford, which is near Kelham, and were cognizant of the facts, their statement is entitled to weight as evidence of reputation: *Duke of Newcastle v. The Hundred of Broxtowe* (f). It was also contended, that the record was not admissible unless it decided the very point at issue; but that is not so, for in *Price v. Littlewood* (g), which was an action for disturbing the plaintiff's enjoyment of a pew, an old entry in a vestry-book was admitted, shewing that the pew had been repaired by the plaintiff's ancestor, and Lord Ellenborough C. J. admitted it as the reputation of the parish. So the custom of one manor would probably be evidence to prove a custom in an adjoining manor, if there be any foundation laid by shewing a *lex loci*, though the Court seems to have been of a contrary opinion in *Doe v. Sisson* (h). Again, as one of the questions before the jury must have been as to the bridge being an ancient bridge, the verdict of the jury upon that point shews what the state of facts was before that time; and so also the question whether the bishop had contributed of his own alms or not was material to be inquired into, as it appears by 2 *Inst.* 700, that repairs done

1838.

The Queen  
&  
Lady  
H. Suffolk  
and others.

(a) 1 M. &amp; S. 679.

(b) 2 B. &amp; Ad. 245.

(c) 14 East, 327 n.

(d) 14 East, 330 n.

(e) 7 C. &amp; P. 181.

(f) 4 B. &amp; Ad. 273.

(g) 3 Camp. 288.

(h) 12 East, 62.

1838.  
  
 The QUEEN  
 v.  
 Lady  
 H. SUTTON  
 and others.

of alms by a bishop once or twice would be a *prima facie* case of liability *ratione tenuræ* until he proved the contrary.

Sir *F. Pollock*, *N. R. Clarke*, and *Waddington*, contra. The admissibility of the record appears to be now contended for on two grounds: First, That it was admissible as shewing a *lis mota*, without reference to its results; and, second, That it is evidence in itself material to the issue.

The first ground is a mere pretext for getting it in evidence; for what can it signify, that the Bishop of Lincoln was found not guilty on a presentment for non-repair of the bridge in the reign of *Edw. 3*. It is said, because a verdict of guilty against another party would be evidence to shew that the defendants are not liable, so a verdict of not guilty is evidence for the same purpose; and the fallacy attempted to be raised is, that the absence of a proposition is equivalent to the negation of it. All that the record shews is, that there was a *lis mota* between other parties, which therefore is irrelevant on the present occasion. Suppose there had been a prosecution a year or two after the *20 Edw. 3*, would the record have been admissible then to prove a *lis mota*? and if not then, why should it now? When the jury had acquitted the Bishop of Lincoln their functions were discharged, and any thing more that they may have stated, is no more admissible than any thing else that passes out of Court. The main question then is, whether the contents are admissible *per se*, as a verdict or an inquisition? The passages cited from *Hale* (a) and *Hawkins* (b), as to the finding of a jury, only relate to felonies, not to misdemeanors; and it appears by Sir *M. Hale*, that the practice was obsolete even in his time. It is contended, that a verdict on public matters is evidence as quasi reputation; but this must be taken with a qualification, because the rule as to a verdict on criminal matters is, that it is not evidence between other parties, as it may have been obtained on the evidence of interested witnesses. In this case the inhabitants

(a) 2 Hal. P. C. 300.

(b) 2 Hawk. P. C. b. 2, c. 9.

of Kelham were certainly interested on the trial of the first presentment. If the verdict is relied upon as reputation, there is a fatal objection to it, that reputation is not evidence of a particular fact. Mr. *Starkie* lays it down, 1 Ev. 34, "neither reputation nor traditionary declarations are admissible as to a particular fact." All the facts found by the jury as to the time the bridge was built, and the alms given by the bishop &c., resolve themselves into particular facts, and therefore fall within the rule laid down by Mr. *Starkie*, and of which *Harwood v. Sims* (a), and *Chatfield v. Fryer* (b) are an illustration. If that be so, the only part of the finding that can be resorted to is the declaration of the jury, that they are entirely ignorant who is liable to repair; but when was it ever heard of, that such evidence was given to prove reputation, unless it was first made out that the subject was fully investigated? Again, the record is said to contain an inquisition of a public nature, but it is no more than an ordinary prosecution for the repair of a bridge, regarding private rights only. Lastly, it is said to be admissible, because it is referred to in the writ of privy seal; but the writ speaks of an inquest, and there is nothing to shew that this is the inquest referred to. It would rather refer to an inquest of office, which would be preserved in the Chancery, and which would have contained a full investigation of the subject.

1838.  
  
 The QUEEN  
 v.  
 Lady  
 H. SUTTON  
 and others.

*Cur. adv. vult.*

LORD DENMAN C. J. on this day delivered the judgment of the Court.—On the last trial of this long pending question, whether the defendants are liable to the repair of Kelham Bridge, over the Trent, *ratione tenuræ*, objection was taken by the prosecutor to the admission of an ancient document brought from the Exchequer of Pleas at York, purporting to be the record of pleas in Hilary term, 18 Edw. 3. (His lordship then stated the contents of the record.) Much discussion appears to have taken place at the trial,

(a) Wightw. 112.

(b) 1 Price, 253.

1838.  
 The QUEEN  
 v.  
 Lady  
 H. SUTTON  
 and others.

as well as in this Court, respecting the purpose for which this evidence was received, as if it might be admissible in some points of view, though not in others. We find it unnecessary to consider any distinctions of this kind, because we are clearly of opinion that these documents, all and each of them, were material to the issue, and good evidence towards proving it. They established, that in the time of *Edward 3*, the men of Kelham, acting for the public, and represented by *John of Lincoln*, an officer of the crown, proceeded against the party whom they conceived chargeable with repairing the bridge. Him the jury acquitted of the charge; and it was argued that this was all they had a right to do, and that their ignorance of any other liability, and their statement of the origin of the bridge, and the manner in which the bishop contributed by way of charity, and not upon compulsion, were beyond their province. We think it cannot be assumed, that at the remote period of this inquiry, the functions of a jury were bounded within the same limits as at present; every lawyer indeed knows that the contrary is the fact. With the reasonable presumption, therefore, which must always be made in favour of the regularity of proceedings conducted by proper authority, it might not be too much to hold, that this inquest was a public proceeding, in which the jury might properly inquire, not only whether the person charged, but also in general who, and whether any one, was liable to the repairs.

At the same time we find no necessity for going this length, because, even if there should be some irregularity in setting forth some particulars not inquired of, that cannot vitiate what was correctly done. The facts, then, that the bishop was presented as chargeable by the men of Kelham, acting for the public, that such presentment ended with his acquittal on that ground, and was shortly followed by the grant of pontage to the men of Kelham for the same repairs, were strong to negative any immemorial liability *ratione tenuræ*, because we must suppose

that the presentment would rather have been made against the person so liable, than against the bishop, and that the grant of pontage would not have been made at all.

1838.  
The QUEEN  
v.  
LADY  
H. SUTTON  
and others.

Rule discharged.

BLUNT and another v. HARWOOD.

Tuesday,  
June 12th.

SIR F. POLLOCK, in Easter term last, obtained a rule to shew cause why a writ of prohibition should not issue to the Arches Court of Canterbury to prohibit that Court from further proceeding in a cause therein pending on behalf of *Samuel Jasper Blunt* and *John George Fuller* against *Benjamin Harwood*.

1. Where a committee had been appointed by a vestry in March, to consider a plan then produced, and to report whether it would be expedient to adopt that or any other plan for affording additional accommodation to the parishioners at the parish church, the following was held to be sufficient notice under the Church Building Acts, (58 Geo. 3, c. 45, and 59 Geo. 3, c. 134,) and the Vestry Act, (58 Geo. 3, c. 69,) that

The affidavits of Mr. *Harwood*, on which the rule was obtained, stated that a libel had been exhibited against him in the Arches Court by *Blunt* and *Fuller*, the churchwardens of the parish of Streatham, in Surrey, for the non-payment of certain sums alleged to be due by him in respect of a certain rate, made on the 13th of February, 1836, for the repairs of the parish church, and for and towards the re-payment of part of a principal sum of 3300*l.* alleged to have been borrowed in November, 1830, under the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, and for the payment of half-a-year's interest on such part of the same sum as remained unpaid. That the libel alleged the said sum to have been borrowed under the authority of resolutions entered into at a meeting of the parishioners in vestry

the object of a subsequent meeting was to authorize the borrowing of money:—"24th July, 1830. Notice is hereby given, that a vestry will be held in the vestry-room of this parish on Monday, the 2d of August, at nine o'clock, &c., to receive a report from the church committee, and to adopt such measures as may appear necessary for carrying the report into execution."

2. *Quere*, would the notice have been sufficient, if the latter part of it ("and to adopt such measures, &c.") had been omitted? *Semble*, per *Patteson J.* that it would: per Lord *Denman C. J.*, and *Littledale J.* that it would not.

3. *Quere* also, where a church rate has been made for the re-payment of money borrowed under certain acts, and a parishioner, who refuses to pay the rate, on the ground that sufficient notice of borrowing the money was not given to the parish under those acts, has been libelled in the Arches Court, has this Court jurisdiction to prohibit the Court below, after the libel has been admitted to proof, but before sentence?

1838.  
 BLUNT  
 and another  
 v.  
 HARWOOD.

assembled on the 2d of August, 1830, when a certain committee, which had been appointed by a vestry, held on the 17th March, to consider a plan then produced, and to report whether it would be expedient to adopt that or any other plan for affording additional accommodation at the church, presented their report, recommending an enlargement of the parish church at an expense of \$300*l.* agreeably to certain plans; and their report was adopted. That after the exhibition of the libel, certain additional articles were exhibited by the churchwardens, alleging that a certain notice was given on the 25th July, 1830, that a vestry was to be held in the vestry-room of the parish on the 2d August then next, at nine A. M., to receive the report of the committee appointed to consider the plans produced to the previous meeting of the vestry on the 17th March, for affording additional accommodation to the parishioners desirous of attending divine worship in the parish church. The affidavit then objected that this notice was insufficient, as it did not declare the special purpose of the meeting according to the Vestry Act, the 58 *Geo.* 3, c. 69, and that neither the libel nor the additional articles pleaded that any other notice was given. That deponent had appeared to the libel, and that on the 31st of January last, Sir *H. Jenner* admitted the libel to proof, and assigned the deponent to give an issue thereto, but that no sentence had been given in the suit.

An affidavit in answer alleged that a notice was duly published on the 7th of March, 1830, which was expressed to be a notice for the holding of a vestry in the vestry-room of the parish on the 17th of March, 1830, at nine A. M., for the purpose of affording additional accommodation to the parishioners attending divine service in the parish church. That this notice could not be produced, but that at the meeting held in pursuance of it, the committee was appointed as pleaded in the libel. That the following notice also was duly published on the 25th of July preceding the meeting on the 2d of August, 1830:—

“ Streatham, 24th July, 1830.


“ Notice is hereby given, that a vestry will be held in the vestry-room of this parish, on Monday, the 2d day of August, at nine o'clock precisely, to receive a report from the church committee, and to adopt such measures as may appear necessary for carrying that report into execution; and further, that it is intended that such vestry do adjourn to the workhouse of this parish, there to transact the business of the day.”

That the original notice, of which the above is a true copy, had been lost, and not found until the day before making the affidavit. The affidavit also stated that *Harwood* was present at both meetings, and that he took an active part in furtherance of the proceedings for carrying the plans into effect.

Sir *W. W. Follett* and *Channell* now shewed cause. If notice of the meeting in August, 1830, at which the resolution was come to for borrowing money, was invalid, it is objected that the whole foundation fails, and that the rate made in 1836 cannot be levied. It is said that sufficient notice was not given, according to *Sturges Bourne's Act*, the 58 *Geo. 3*, c. 69, s. 1. That act provides “ that no vestry or meeting of the inhabitants in vestry of or for any parish, shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and *the special purpose thereof*, three days at the least before the day to be appointed,” &c. This act does not say that all proceedings at a vestry held without due notice shall be void; and it certainly never could be intended that they should be avoided at the instance of a party who has acquiesced in them for so long a period, and who promoted the adoption of them. On the 17th of March, 1830, a meeting of the parishioners was held, and a committee was appointed to consider certain plans for enlarging the parish church and to make a report. The notice, given in the additional articles, stated that those

1838.

BLUNT  
and another  
v.  
HARWOOD.


1838.  
  
 BLUNT  
 and another  
 v.  
 HARWOOD.

plans would be considered at the meeting of the 2d of August. Those plans could not be carried into execution without expense, and it must have been notorious to the whole parish that one of the most essential objects of that meeting was to decide in what manner the expense should be defrayed. The subject-matter and object of the meeting were known, and it was not necessary that it should also be known that 3300*l.* was to be borrowed. But the notice, as represented in the articles, need not be relied on; the notice really given has since been found, and, according to the practice of the Ecclesiastical Courts, the real notice may be now set out, which announces distinctly that "the special purpose" of the meeting was "to adopt such measures as may appear necessary for carrying that report into execution, &c."

Sir *F. Pollock* and *M. Smith*, *contra*. The notice in the libel and the additional articles is insufficient, and the Court cannot consider any other notice. [Lord *Denman* C. J. We think the question had better be discussed with reference to the notice now produced.] The rate can only be good by relation to the meeting of the 2d of August, 1830, and the legality of that meeting depends altogether upon the notice of the 24th July. If the meeting had no right to borrow money, any rate towards its re-payment is bad, and no acquiescence on the part of Mr. *Harwood* can set it up; *Rex v. Dursley (a)*. The true construction of 58 *Geo. 3*, c. 45, s. 58, is, that there must be a distinct assent on the part of the parishioners to authorise the borrowing of money. Section 60 provides that no application to build or enlarge any chapel, by means of any rates, shall be made, unless two-third parts in value of the proprietors of lands shall have consented thereto in writing; and this provision is recited and repealed by 59 *Geo. 3*, c. 134, s. 24, which prohibits such application, if one-third part in value dissent. Unless proper notice be given, there is no opportunity for the parishioners to express dissent. By *Sturges*

(a) 5 Ad. & El. 10; S. C. 6 N. & M. 333.

Bourne's Act no vestry can be held unless notice has been given of its special purpose, which must mean something more than its general object, especially when that object is to impose a burden on the parish. It did not appear from this notice that it was intended to borrow money; it might have been intended to raise money by pew rents.

1838.  
  
 BLUNT  
 and another  
 v.  
 HARWOOD.

LORD DENMAN C. J.—No question has been raised as to the jurisdiction of this Court to interfere, under the circumstances, by prohibition. In *Gare v. Gapper* (a) the Court made absolute a rule for a prohibition, in order that it might be fully considered whether, supposing the Court below to have misconstrued a statute, a prohibition should go, after sentence, in a matter in which the Court below had original jurisdiction, or whether it were only a ground of appeal. The sufficiency of the first notice is very doubtful, and if there were no other notice I should say this rule ought to be made absolute. But if the libel is amended by the insertion of the real notice, I think it will then appear that full and substantial information had been given to the parish, that the object of the meeting in August was to borrow money; for proceedings had already been taken, and were finally to be resolved upon, towards the enlargement of the church, for which a loan would necessarily be required. The Church Building Acts, which have been referred to, do not seem to require more explicit notice; nor does the language of the Vestry Act, prohibiting any meeting of the vestry until public notice shall have been given of the special purpose thereof, carry the case any further. No particular form of notice is prescribed by any of the acts.

LITLEDALE J.—If the question turned on the notice in the libel, I should say this rule ought to be made absolute; but if the libel is amended by introducing the notice which has now been found, and is set out in the affidavit, then I think the Court below may proceed to enforce pay-

(a) 3 East, 472.

1838.

BLUNT  
and another  
v.  
HARWOOD.

ment of the rate. It is enough that the notice, without going into particulars, communicated generally the information that money was to be borrowed; and this information was, I think, communicated by notice that measures were to be adopted which involved the necessity of borrowing money.

PATTESON J.—I am not altogether satisfied that the notice as it now stands in the libel is not sufficient, and I have no doubt that, as proposed to be amended, it is free from all objection. No particular form of notice is required by any of the acts referred to. We have then to consider only whether the notice given really informed the parishioners of what was intended to be done; and I am of opinion that none of them, on reading this notice and taking it in connection with all the previous proceedings with respect to the same subject, could have the slightest difficulty in understanding that money was to be borrowed. A church can neither be built nor enlarged without money, and whence was this money to come? Nothing at all appears to warrant the suggestion that it was to be raised by voluntary subscription or by pew rents, which are illegal unless specially allowed by act of parliament. The defendant, after a long period of acquiescence, now objects for the first time to the authority of the vestry meeting. I do not mean to say that he is now to be estopped from opposing the enforcement of this rate, if it was invalid originally, but the continued acquiescence both of himself and the rest of the parish is a strong circumstance to shew that every body understood very well what business was to be transacted at the meeting of the 2d of August. The whole argument has gone upon the assumption of our jurisdiction to interfere, on the supposition that the Court below is about to misconstrue certain acts of parliament. I am, however, by no means satisfied of our jurisdiction, and *Gare v. Gapper (a)* is a decision which I profess myself quite unable to understand.

(a) 3 East, 472.

**WILLIAMS J.**—The notice set out on affidavit was in my opinion such as to prevent any surprise upon the parishioners. The meeting was convened to adopt such measures as might appear necessary for carrying into execution the committee's report on plans for enlarging the church. The measures to be adopted for carrying the report into execution could not relate merely to architectural plans; the notice obviously announced that one of the objects of the meeting was to consider in what way the expense of carrying that report into execution could best be provided for.

1838.

BLUNT  
and another  
v.  
HARWOOD.

Rule discharged.

ROBINSON v. MESSENGER.

Tuesday,  
June 12th.

**DUNDAS** had obtained a rule to shew cause why the Master should not review his taxation of costs in this cause, and allow to the plaintiff the costs of the second issue. The action was brought on the warranty of a horse, to which the defendant pleaded—1, non assumpsit; 2, that the horse was sound. At the trial before *Patteson J.*, at the Lent assizes, 1838, for Appleby, the defendant had a verdict on the first issue, and the plaintiff on the second. The learned judge certified, under the 4 *Anne*, c. 16, s. 5, that the defendant had probable cause to plead the second plea. The Master had refused to allow the costs of the second issue to either party.

The New Rules, 4 *Will.* 4, r. 7, have not repealed the 4th *Anne*, c. 16, s. 5, as to the judge's power to certify, so as to exempt the defendant from the costs of an issue found against him, where he has pleaded several matters. Where, therefore, to an action of assumpsit on the warranty of a horse, the defendant pleaded—1, non assumpsit; 2, that the horse was sound:

*Armstrong* and Sir *G. Lewin* now shewed cause. The 4 *Anne*, c. 16, ss. 4 and 5, allows the defendant, with the leave of the Court, to plead several matters, and provides that, if a verdict shall be found against him upon any issue, he shall pay costs, *unless* the judge who tried the issue cer-

and a verdict having been found for him on the first plea, and against him on the second, the judge who tried the cause certified that he had probable cause for pleading the second plea,—he was held to be exempted by the statute from paying any costs in respect of it.

1838.

ROBINSON  
v.  
MESSENGER.

tify that the defendant "had probable cause to plead such matter, which upon the said issue shall be found against him." The learned judge who tried this cause having certified that the defendant had probable cause for pleading the second plea, he is exempted by the statute from payment of costs in respect of it, unless the new rules, H. T. 4 *Will.* 4, repeal the above provision of the statute. By Rule 7, (*General Rules and Regulations*,) a defendant who pleads several pleas, and does not at the trial establish a distinct ground of defence under each plea, is made liable for the costs occasioned by the plea which he shall have so failed to establish. This rule, however, does not apply to a case like the present, where the grounds of defence in the two pleas are distinct upon the face of them; and as it has no express words for the purpose, it cannot be construed to repeal the statute of *Anne*, which is an enabling statute. The result of the trial of the whole record was, that the plaintiff had no cause of action; for as the action was on a warranty, and it was found that no warranty existed, it was quite immaterial whether the horse was sound or not; so that this case is precisely the same with *Cooke v. Sayer* (a).

*Dundas*, contra. The judge had no authority to certify. The licence given by the statute of *Anne* is inconsistent with the new rules, and therefore is repealed by them, as they have themselves the force of a statute. [*Patteson J.* The words of the 7th rule may be large enough to apply to the pleas in this case; but the rule seems rather pointed at such pleas as merely varied the same ground of defence, and might be made the subject of an application to a judge.] He also cited *Bird v. Higginson* (b), *Spencer v. Hamerton* (c), *Simpson v. Hurdis* (d). [*Patteson J.* mentioned *Richmond v. Johnson* (e).]

(a) 2 Burr. 753.

(b) 5 Ad. &amp; El. 83.

(c) 4 Ad. &amp; El. 413.

(d) 5 Dowl. P. C. 304.

(e) 7 East, 583.

Per CURIAM (a).—It was not intended, by the new rules which have been referred to, to repeal the statute of *Anne* as to double pleading.

Rule discharged.

(a) Lord Denman C. J., *Littledale, Patteson and Williams* Js.

1838.  
ROBINSON  
v.  
MESSENGER.

YOUNG v. RISHWORTH.

Wednesday,  
June 13th.

**ASSUMPSIT** for money had and received to the use of the plaintiff, and on an account stated. Pleas: 1, non assumpsit: 2, that on the 15th July, 1822, a commission of bankruptcy issued out against the plaintiff, under which he was duly declared to be a bankrupt; and that on the 22d July, in the year aforesaid, notice was published thereof in the public Gazette; and that the plaintiff afterwards, on the 21st October, in the year aforesaid, duly obtained his certificate: and the defendant further saith, that the plaintiff aforesaid, on the 20th May, 1825, again became a bankrupt, and that on that day a commission of bankruptcy issued out against him, under which he was duly declared to be a bankrupt. The defendant then averred, that on the 5th July, in the year aforesaid, assignees were duly chosen of the estate and effects of the plaintiff, and that an assignment was made to them of all the present and future personal estate of the plaintiff, for the benefit of his creditors; and although the plaintiff duly surrendered himself &c., and duly conformed himself to the statutes then in force concerning bankrupts, and although the plaintiff afterwards, and after the making of the 6 Geo. 4, c. 127, to wit, on the 1st April, 1826, duly obtained his certificate of conformity under the last-mentioned commission, nevertheless the defendant says that the estate of the plaintiff under the last-mentioned commission has not produced sufficient to pay the creditors, under the last-mentioned commission, 15s. in the pound, whereby and by one of the statutes in such case provided, the debt in

1. Section 127 of 6 Geo. 4, c. 16, which vests in the assignees all the future estate and effects of a bankrupt who does not pay 15s. in the pound under his second commission, is retrospective.

2. In assumpsit to recover a sum of money, defendant pleaded that plaintiff had been twice a bankrupt, and that he had not paid 15s. in the pound under the second commission: Held, on special demurrer, to be a good plea, as the 6 Geo. 4, c. 16, s. 127, had vested his estate in such case in his assignees absolutely, and did not leave interference.

him a right of action subject to their

1838.  
  
 YOUNG  
 v.  
 RISHWORTH.

and by the declaration demanded hath vested in the said assignees under the last-mentioned commission. Verification. Special demurrer and joinder.

*Knowles*, in support of the demurrer, in Hilary term last (*a*). The question raised by this demurrer is, whether the estate and effects of a trader who has been twice a bankrupt, but who has not paid his creditors 15s. in the pound, vest so absolutely in the assignees, that he is prevented from suing, even though his assignees do not interfere.

I. There is a difference between the language of the 5 *Geo.* 2, c. 30, s. 9, and the 6 *Geo.* 4, c. 16, s. 127, with respect to second bankruptcies. The former statute made the future effects of a trader, who should be a bankrupt for a second time, liable to his creditors only; the 6 *Geo.* 4 vests them in his assignees (*b*). But it is submitted that the principle of the decisions on the former statute, with respect to an uncertificated bankrupt, apply to the present case. Those cases shew that, except as against his assignees, an uncertificated bankrupt may maintain assumpsit for work and labour; *Silk v. Osborne* (*c*), *Chippendale v. Tomlinson* (*d*); or for money lent, *Evans v. Brown* (*e*); or bring trover, *Webb v. Fox* (*f*); or may indorse bills of exchange, *Drayton v. Dale* (*g*). The ground of these decisions is, that if the assignees do not choose to sue in such cases, the debt would be lost, unless the bankrupt were allowed to sue, and this was expressly put forward by *Holroyd J.*, as the ground of his decision in *Drayton v. Dale* (*g*). If these cases be law, they apply equally strongly to a person twice a bankrupt as to an uncertificated bankrupt, and the analogy between the two cases was strongly relied upon by Sir *W. Follett* in *Robertson v. Score* (*h*).

(*a*) Jan. 19, before Lord *Denman* C. J., *Littledale, Williams* and *Coleridge* Js.

(*b*) See the section in the judgment of the Court.

(*c*) 1 *Esp.* 140.

(*d*) 1 *Cooke's B. L.* 518.

(*e*) 1 *Esp.* 170.

(*f*) 7 *T. R.* 391.

(*g*) 2 *B. & C.* 293; 3 *D. & R.* 534.

(*h*) 3 *B. & Ad.* 338.

II. It is not yet a decided point, whether section 127 of 6 Geo. 4 is retrospective. It was certainly held to be retrospective in *Elston v. Braddick* (a), but a contrary decision had been come to by this Court in *Carew v. Edwards* (b); and in *Ex parte Hawley* (c) it was decided that the section is not retrospective, where both commissions issued before the commencement of the act, which is the present case, as the act came into operation on the 1st September, 1825.

1838.  
  
 YOUNG  
 v.  
 RISHWORTH.

III. But assuming section 127 to be retrospective, it does not appear on these pleadings that the debt sued for vested in the assignees at all. By that section, the tools of trade, furniture and clothes of the bankrupt, are excepted from vesting in the assignees; therefore, according to a well-known rule in pleading, the plea should have negated the exception. [*Coleridge J.* If a bankrupt sells his tools or furniture, would the money be obtained for them come within the exception?] Probably it would, according to Lord *Kenyon's* views in *Evans v. Brown* (d). Besides, what is there to shew that the plaintiff is not a trustee of the debt? It lay upon the defendant to shew that the debt was of such a nature as to vest in the assignees. [*Littledale J.* If the plaintiff sued as a trustee, he should have shewn that in his replication, as in *Winch v. Keeley* (e).]

Sir *W. W. Follett*, contrà. The present case has been First point.  
 virtually decided by many cases, on section 127 of 6 Geo. 4, c. 16. It is true that in *Robertson v. Score* (f) the same argument was used that has been urged to-day, to shew the analogy between an uncertificated bankrupt, and a person twice bankrupt, but it was unsuccessful, and it was held that the effect of the clause was to vest all future debts of the bankrupt absolutely in the assignees, when 15s. in the pound had not been paid under the commission. The

(a) 2 C. & M. 435.

(d) 1 Esp. 170.

(b) 4 B. & Ad. 351; S. C. 1 N. & M. 632.

(e) 1 T. R. 619.

(c) 2 Mont. & Ayr. 426.

(f) 3 B. & Ad. 338.

1838.  
  
 YOUNG  
 v.  
 RISHWORTH.

Third point.

decision of the Court also in *Elston v. Braddick* (a), in *Ex parte Robinson* (b), and in *Fowler v. Coster* (c), all proceeded on the ground that the 127th section vested all the effects of such a bankrupt in the assignees. But the present case does not fall within the principle of the cases cited on the other side. For in all of them something was shewn to take out of the provisions of the Bankrupt Act the debt in question, which *primâ facie* vested in the assignees. Under the 5 Geo. 2, c. 30, the bankrupt had a defeasible estate in such of the property as the assignees allowed him to enjoy, and therefore he might maintain assumpsit for his work and labour, or sue on bills of exchange, which his assignees had permitted him to hold; or, if he were allowed to retain possession of his house, he might bring any action against wrong-doers. The cases are collected in *Eden's Bank. L. 255*, but he adds to them the cases of *Nias v. Adamson* (d) and *Hull v. Pickersgill* (e), which shew how slight even under the old act was the uncertificated bankrupt's right to any property. Under the present act, the goods are vested *primâ facie* in the assignees; and if the bankrupt relies upon any thing to take the case out of the statute, he should shew it by his plea. This distinction depends on the difference in the language of the 5 Geo. 2, c. 30, and the 6 Geo. 4.

Second point.

III. *Elston v. Braddick* (a) has been considered to have settled the question as to the retrospective effect of the 127th section. *Ex parte Hawley* (f), which has been cited, has an incorrect marginal note, and it does not appear on what ground Lord Brougham C. decided the case.

*Knowles*, in reply. No attempt has been made to distinguish between a bankrupt not paying 15s. in the pound under the second commission, and an uncertificated bankrupt. *Elston v. Braddick* (a) does not govern this case, for

(a) 2 C. & M. 435.

(b) Mont. & Mac. 44.

(c) 10 B. & C. 427; S. C. 5

Mann. & R. 352.

(d) 3 B. & Ald. 225.

(e) 1 Brod. & B. 282.

(f) 2 Mont. & Ayr. 426.

there the assignees adopted the debt and sued, which it is conceded they may in all cases. It is said that the plaintiff should have replied any special matter on which he relies; but that is not so, for in *Drayton v. Dale* (a), where to a plea of bankruptcy the plaintiff replied, that after the assignment the bankrupt indorsed the bill sued upon with the consent of the assignees, although this issue was found against the plaintiff, the Court held that he was entitled to judgment on the whole record, and therefore held that the replication raised an immaterial issue.

1838.  
  
 YOUNG  
 v.  
 RISHWORTH.

*Cur. adv. vult.*

LORD DENMAN C. J. on this day delivered the judgment of the Court.—This was an action brought in *assumpsit*, upon counts for money had and received, and on an account stated. The defendant pleaded in substance that the plaintiff, in the year 1822, became bankrupt, and obtained his certificate; and again, that in the year 1825 he became bankrupt, and on 1st April, 1826, obtained his certificate, but that the estate of the plaintiff, under the latter commission, was not sufficient to pay his creditors 15*s.* in the pound, and had not paid them, or any of them, that sum. To this there was a demurrer, and the question is, whether, under the circumstances disclosed in that plea, the plaintiff is entitled to bring this action; and that mainly depends (as was admitted in argument on both sides) upon the proper construction of the 127th section of 6 *Geo. 4*, c. 16; because if that statute applies to the cases of bankruptcy which took place before it passed, it was hardly contended but that the plea does amount to an answer to the action; and we think that, after the decisions which have taken place, the question can no longer be considered as open. The language of the 127th section of 6 *Geo. 4*, c. 16, is as follows:—“If any person who shall have been so discharged by such certificate as aforesaid &c., shall be or become bankrupt, and have obtained or shall hereafter obtain such

(a) 2 B. & C. 293; S.C. 3 D. & R. 534.

1838.  
  
 YOUNG  
 v.  
 RUSHWORTH.

certificate as aforesaid, unless his estate shall pay 15s. in the pound, his future estate and effects (except &c.) *shall be vested* in the assignees under the commission." And upon this point, whether the Bankrupt Act does apply to commissions sued out, and certificates thereunder obtained before it passed, or, in other words, whether the statute just quoted be in its effect retrospective, the Court of Exchequer, after deliberation and a careful comparison of the language of the two statutes (5 Geo. 2, c. 30, and the present act), have come to a decision in the affirmative. That being so, we consider ourselves bound by that decision, being of opinion that it is most inconvenient to question the authority of cases deliberately decided, except for the strongest and clearest reasons. In this case, however, we approve of the reasons given as well as of the decision itself, which is indeed fortified by the cases of *Fowler v. Coster* (a) and *Robertson v. Score* (b).

The statute therefore being (as we think it is) applicable to the present case, what is its effect? The words are, "his future estate and effects shall be vested in the assignees," and his person only be protected. The language of the former act, 5 Geo. 2, c. 30, s. 9, is different; it is there said that "the future effects shall remain liable to his creditors, as before the passing of that act," that is (according to the construction put by this Court in *Fowler v. Coster* (a)), liable to his individual creditors. Here, however, they are vested absolutely in the assignees, and, by consequence, divested from the bankrupt under the circumstances disclosed in the plea, which we therefore think contains a sufficient answer to the action, and that judgment must be for defendant.

Judgment for the defendant (c).

(a) 10 B. & C. 427; S. C. 5 M. & R. 352.

(b) 3 B. & Adol. 338.

(c) See *Guthrie v. Boucher*, 8

Simons, 248, where *Shadwell V. C.* decided that section 127 of 6 Geo. 4, c. 16, applied only to bankruptcies happening after the act.

## The QUEEN v. The Justices of DERBYSHIRE.

1838.

Wednesday,  
June 13th.

SIR W. W. FOLLETT, on a former day in this term, had obtained a rule for a mandamus to the defendants to enter continuances and hear an appeal against an order of removal.

Notice of appeal, and a statement of the grounds thereof, had been duly served on the respondent parish before the last Epiphany sessions at Chesterfield, when, in consequence of the pressure of business, the case was made a remanet to the Easter sessions. Before these sessions a fresh statement of the grounds of appeal was served, which differed in some respects from the former. When the appeal came on for trial, and the appellants had been called upon to produce their statement, they produced both statements; and the Court, after discussion, held that they must elect and rely upon one only, and on their electing to rely on the statement last served, it was objected that they had thereby waived the other, and that the statement relied on was invalid, because it had not been served, according to 4 & 5 Will. 4, c. 76, s. 81, fourteen days before the first day of the sessions at which the appeal was *intended* to be tried, which sessions, in this case, were the Epiphany, and not the Easter sessions. The sessions decided in favour of the objection and dismissed the appeal.

A statement of the grounds of appeal against an order of removal was duly served before the Epiphany sessions, when the appeal was intended to be tried, but in consequence of pressure of business was made a remanet. A fresh statement, differing in some respects from the former, was afterwards served, and relied upon at the next sessions:—Held, that the sessions were bound to hear the appeal on the second statement.

*N. R. Clarke*, now shewed cause. If the word *intended* is to have any meaning at all, the appellants were bound by the statement originally served before the prior sessions, when they certainly intended to try. [Lord Denman C. J. Suppose they had given in their statement so early before the sessions, that they had time enough afterwards to serve a totally different or an amended statement, could they not have done so?] Such a licence would be most inconvenient. If the respondents relied on a settlement by hiring and service in the appellant parish, and the first statement of the appellants had set up a subsequent settlement in

1838.

~  
The QUEEN  
v.  
Justices of  
DERRYSHIRE.

some other parish, the appellants might, in the event of the witness dying who was to prove the case against them, serve another statement, containing a simple denial of the hiring and service, which would be no longer capable of proof. The examination of the pauper and the statement of the grounds of appeal, are like a record at *Nisi Prius*. Where an appeal has been made a remanet, it is as irregular to substitute a new statement, as for a defendant to alter his pleas, where a cause has been made a remanet. [Lord *Denman* C. J. The sessions might award costs to the respondents, if they should be misled, and thereby put to expense.] They have no power to award costs to the respondents, unless ultimately successful, and the variation of statement might be the very cause of their failure.

Sir *W. W. Follett*, and *Willmore*, contra, were not called upon.

LORD DENMAN C. J.—I do not think the word *intended*, in the act, should be construed so as to confine the appellants strictly to their original statement. It is reasonable that they should be heard.

LITLEDALE and PATTESON Js. concurred.

Rule absolute (a).

(a) *Williams J.* was sitting in the Bail Court.

Wednesday,  
June 13th.

THE QUEEN v. WILLIAM ROBERTS.

Where a quo warranto information has been brought against a municipal officer for a defect in his election,

7 *Will.* 4 and 1 *Vict.* c. 78, s. 2, application to discontinue should have been made immediately after the passing of that act, in order to entitle the relator to his costs.

IN this case there had been an information in the nature of a quo warranto against the defendant, for exercising the office of mayor of the borough of Carnarvon. On a demurrer to the replication the same objection was set up to the defendant's election as in the case of *Regina v. W. L. Roberts*.

*berts (a)*. After the decision in that case, Sir *W. W. Follett*, on the part of the relators, obtained a rule nisi to discontinue the proceedings, and calling upon the defendant to pay the costs up to that time, under the 7 *Will.* 4 and 1 *Vict.* c. 78, s. 20.

1838.  
  
 The QUEEN  
 v.  
 ROBERTS.

*Jervis* now shewed cause. The objection to the defendant's election in this case is, that he was elected mayor before the whole number of aldermen were elected, but such an election is declared to be good by the second section of the new act. It is not one of the cases provided for by s. 1, which enacts that certain defects in the title shall not be questioned; s. 20, therefore, does not apply to the present case; for although the words of it are general, section 1 refers expressly to s. 20, but s. 2 does not, which shews that s. 20 was not intended to apply to it. It does not even appear that the defendant relies on the 7 *Will.* 4 and 1 *Vict.* c. 78, for the validity of his election; he is prepared to argue the demurrer, and contend that his election is good under the first municipal act. But if the argument is gone into the Court must recognize the 7 *Will.* 4 and 1 *Vict.* c. 78, s. 2, which declares that his election is good. In neither case therefore can the defendant be called upon to pay costs. II. At all events the intention of the legislature was, that application to discontinue should have been made immediately after the passing the act. It was not contemplated that the case should be proceeded with till it was ripe for judgment, and then that the relators should abandon their case, and seek to make the defendant pay all the costs. That being so, the application should come from the relators. A defendant cannot discontinue.

Sir *W. W. Follett*, *contrà*. The present proceedings on the part of the relators are moulded on the decisions of the Court in *Regina v. Jones (b)* and *Regina v. W. L. Roberts (a)*. As the Court decided there, that the late act is not of itself a discontinuance of the proceedings, and that if

(a) *Ante*, p. 295.

(b) Not yet reported.

1838.  
  
 The QUEEN  
 v.  
 ROBERTS.

the relator rely on a defect cured by the act, he ought to apply to discontinue, he has now done so. [*Patteson J.* In *Regina v. W. L. Roberts* (a), we held that either party might apply to discontinue; the difficulty arises because the legislature have chosen to say in s. 2, that an election like the defendant's *shall be good*, and therefore there is nothing to induce him to come forward and apply for a discontinuance, which would oblige him to pay costs.] The difficulty seems to suggest that the act itself should be deemed a discontinuance; but the Court, on the former occasion, did not accede to that view. [*Littledale J.* It is difficult to conceive how there can be a discontinuance without a rule for it.] The Court must give effect to the words of the act, s. 20, that the proceedings are to be discontinued upon payment by the defendant of costs "up to that time." And as it has been decided that an application to discontinue is necessary, "that time" must mean the time of application.

Lord DENMAN C. J.—I agree in the argument that the relator is entitled to receive costs up to the time of application, but I think that application ought to have been made immediately upon the passing of the act. For the words of s. 20 are, "that the proceedings shall be discontinued immediately upon passing of this act, upon payment of the costs incurred up to that time." Those words must be taken altogether. Parties are not to wait till they see what the decision of the Court may be, and, when they find it will be against them, to seek to cover themselves by a provision not meant to apply to the case. I am sorry that the act is so ill drawn as to raise so much inconvenience when vested interests are concerned—but still the words of the statute leave no alternative. "That time" must mean immediately on the passing of the act, and if the act itself operated as a discontinuance, it would be the same thing.

LITTLEDALE and PATTESON Js. concurred.

Rule discharged (b).

(c) *Ante*, p. 295.

(b) *Williams J.* was sitting in the Bail Court.

## The QUEEN v. The RECORDER OF HULL.

*Wednesday,  
June 13th.*

**R. C. HILDYARD** had obtained a rule to shew cause why a writ of mandamus should not issue, directed to the defendant, commanding him to investigate the accounts of *Thomas Oglesby*, inspector of weights and measures for the town and county of Kingston-upon-Hull, and make an order for reasonable remuneration to him for the discharge of his duties as such inspector. By the affidavits on which this rule was obtained, it appeared that *Mr. Oglesby* was appointed by the magistrates of Hull, at quarter sessions, inspector of weights and measures, in pursuance of the provisions of the 5 & 6 Will. 4, c. 63, s. 17(a), which was passed Sept. 9, 1835. The 5 & 6 Will. 4, c. 76, having received the royal assent on the same day, a question arose in the town and county of Hull, whether the powers, given to the magistrates in quarter sessions, under section 17, were transferred to the recorder under 5 & 6 Will. 4, c. 76, s. 105, or whether it had not vested in the magistrates under 5 & 6 Will. 4, c. 63, s. 25. The recorder, therefore, on *Mr. Oglesby* making application at the Easter quarter sessions, 1838, for an order that his salary should be paid, declined to entertain the application, for the purpose of giving an opportunity of taking the opinion of this Court as to the point of jurisdiction.

The duty of appointing inspectors of weights and measures &c., under 5 & 6 Will. 4, c. 63, has, by the Corporation Act, 5 & 6 Will. 4, c. 76, devolved upon recorders of boroughs.

*Sir J. Campbell A. G. and Armstrong*, now shewed cause. The question in this case is, whether recorders of boroughs

(a) Section 17 of that act, which was passed Sept. 9, 1835, enacted, that in England, at the general quarter sessions of the peace next after the passing of that act, the justices of the peace of every county, riding, or division, or county of a city, or county of a town, in general quarter sessions assembled, and so from time to time at any

subsequent general or quarter sessions, should (amongst other things) appoint a sufficient number of inspectors of weights and measures &c., and should allot to each inspector a separate district, and should direct what reasonable remuneration should be paid to such inspectors, &c.

1838.  
  
 The QUEEN  
 v.  
 Recorder of  
 HULL.

are in future to appoint inspectors of weights and measures, and perform the other duties which the 5 & 6 Will. 4, c. 63, s. 17, threw upon the justices in quarter sessions. It is contended that, as by the Municipal Corporation Act, s. 105, the recorder is to have cognizance of all crimes, offences, and matters whatsoever, cognizable by any court of quarter sessions of the peace for counties, this, being a matter cognizable by the quarter sessions, is a duty thrown upon the recorder. But it is contended that the intention of the legislature, in the Municipal Corporation Act, was to separate the functions theretofore discharged by the quarter sessions, giving all the criminal jurisdiction to the recorder alone, and the superintendence of all other local matters to the magistrates of the place. This being the clear intention of the legislature, "all matters whatsoever" referred to the recorder must be construed to mean matters *ejusdem generis* to the crimes and offences previously enumerated. [Littledale J. Would not those words include every thing, but for the proviso following, which excepts certain matters?] That which is called a proviso in an act of parliament, is not to be weighed with logical accuracy. It is not like an exception in a lease, but is a term loosely used, often quite unconnected with the previous subject-matter. In this case it serves to shew the intention of the legislature, not to throw on the recorder any thing but the duties of a criminal judge. But, even if the Court should hold that this is not the proper construction, the quarter sessions of the magistrates being abolished, the duties of appointing inspectors &c. fell upon the magistrates out of sessions, under s. 25 of 5 & 6 Will. 4, c. 63.

*Cresswell* (with whom was *R. C. Hildyard*), contra, was stopped by the Court.

LORD DENMAN C.J.—This is one of the numerous cases in which we have to lament the loose language in which these acts of parliament are drawn. There is every reason to sup-

pose that it never was intended to throw the duties of appointing local inspectors on the recorders of boroughs ; but, on looking at the language of the acts, it is impossible to hold that they have not done so. The 17th section of 5 & 6 *Will.* 4, c. 63, and section 105 of 5 & 6 *Will.* 4, c. 76, must be read as if they were in one act. The case would then stand thus : that by the 17th section the magistrates of the town and county of Hull would be directed to appoint inspectors at their quarter sessions ; and then the 105th section authorizes the recorder to discharge all such duties as were cognizable by magistrates at quarter sessions, with a certain proviso, which excepts certain matters, but not the duties in question.

1838.  
  
 The QUEEN  
 v.  
 Recorder of  
 HULL.

LITLEDALE J. concurred.

PATTESON J.—It would be impossible, on section 17 of 5 & 6 *Will.* 4, c. 63, that doubt could be entertained at any time how the powers, with regard to inspectors, were to be exercised, for the clause expressly enacts they must be exercised by the magistrates *in sessions*. Then it appears, that by the Municipal Act (s. 107), the magistrates of a place like Hull never can meet in sessions, and the magistrates thenceforth to be appointed, if not of an inferior, are altogether of a different nature, and it is impossible to say that they are the persons contemplated by the former act (s. 25). The question then arises, whether there are any persons who can discharge these duties. The words of section 105 are certainly large enough to throw those duties upon the recorder, however inconvenient it may be, and however contrary to the intention of the legislature. One would have imagined that a matter of this nature would have been referred to the town council, in like manner with the borough rate, but it is not. Section 25 of 5 & 6 *Will.* 4, c. 63, refers, I think, only to places like Berwick-upon-Tweed, having persons specially authorized in it at the time to appoint inspectors. A word appears omitted in the clause,

1838.

The QUEEN  
v.  
Recorder of  
HULL.

but the meaning is obvious. The conclusion we are compelled to come to may be unfortunate, but we cannot get over the express words of the statute.

Rule absolute (a).

(a) *Williams J.* was sitting in the Bail Court.

Wednesday,  
June 13th.

1. In an ejectment with two demises, one by a trustee in fee, and the other by a *cestui que trust* for life, the question was, as to parcel or no parcel; no evidence was offered on the demise by the *cestui que trust*, but the defendant tendered in evidence a deed by the *cestui que trust* (who had been in possession) as an admission by a party substantially interested in the suit:—Held, that as the

DOE on the several demises of ROWLANDSON, Assignee of MARGARET WILLIAMS, an Insolvent Debtor, MARGARET WILLIAMS, and JEREMIAH WILLIAMS, v. WAINWRIGHT and another.

**EJECTMENT** for premises in Dale Street, Liverpool. At the trial at Liverpool, at the Lancashire Spring assizes, 1836, before *Coleridge J.*(a), the lessors of the plaintiff claimed under the following title:—

9th July, 1807. By a deed of feoffment made between *James Rogers*, 1st part, *James Oldham*, 2nd part, *Michael Williams*, 3rd part, and *Jeremiah Williams*, 4th part, *Rogers* granted unto *Michael* and *Jeremiah Williams*, their heirs and assigns, a piece of land, with the messuages and buildings thereon erected (which included the premises in dispute), habendum to *Michael* and *Jeremiah Williams*, and the heirs and assigns of *Michael*, to the use of the said *Michael Williams* and *Jeremiah Williams*, and the heirs and assigns of the said *Michael*, in trust, as to the estate of the said *Jeremiah*, for the said *Michael Williams*, his heirs and assigns.

(a) See a report of this case on other points, 1 N. & P. 8; S. C. 5 A. & E. 520.

deed was not clearly and unambiguously against the interest of *cestui que trust*, and as it appeared by it that she obtained an advantage under the deed, there was a balance of interests, and her declaration was inadmissible.

2. *Quere*, whether the admission of a *cestui que trust*, whose interest is not commensurate with his trustees, is evidence against the trustee in an action brought by him respecting the trust property.

*Michael Williams* remained in possession of the premises till his death in 1821, and by his will he devised his property to his wife, *Margaret Williams* (one of the lessors of the plaintiff), with remainders over. *Margaret Williams* remained in possession till 1827, when she was turned out by a Mr. *Etches*, who had a transfer of a mortgage, granted by *Michael Williams*, in 1808, but which, it was contended for the plaintiff, did not comprise the premises in dispute.

By a memorandum indorsed on the deed of feoffment it appeared, that in September, 1808, *Michael Williams* conveyed part of the premises contained in the deed of feoffment to one *Lewis*.

The defendant claimed under an indenture of mortgage of the 15th October, 1808, between *Michael Williams*, of 1st part, *Jeremiah Williams*, of 2nd part, and *Thomas Holden* and *Thomas Gordon*, trustees of a tradesman's society, of the third part, by which *Michael Williams* mortgaged to the said *Holden* and *Gordon*, their heirs and assigns, for 150*l.*, all that piece of land, (setting out the parcels,) and described to be then in the possession of *Michael Williams*, upon trust that *Holden* and *Gordon* would permit *Michael Williams*, his heirs and assigns, to occupy; and in default of payment of the principal money on the 15th April then next, on further trust to sell, and after paying themselves the principal monies, to pay the residue to *Michael Williams*, his heirs and assigns.

The defendant then traced his title down from *Holden* and *Gordon*.

The defendant also tendered in evidence indentures of lease and release of 26 & 27 October, 1824, between *Margaret Williams*, 1st part, *Thomas Holden*, surviving trustee, of the 2nd part, and *George Etches*, of the 3rd part, which, after reciting the deed of feoffment of 9th July, 1807, and the mortgage of 15th October, 1808, and that *Michael Williams*, by his will of 27th September, 1821, had bequeathed all his real and personal estate to his wife, for her life, and after her death to his children, share and share

1838.

DOE  
v.

WAINWRIGHT

1838.  
  
 DOE  
 v.  
 WAINWRIGHT.

alike; and that the holders of the mortgage of October, 1808, had applied to her for payment of 150*l.* and interest, and that *George Etches* had agreed to advance the same; and reciting also that *Michael Williams* had borrowed 100*l.* of *Etches*, and that *Etches* had applied to *Margaret Williams* for repayment, which she was unable to make, and that he had commenced legal proceedings against her; and that, in order to put an end to the proceedings, she had agreed to assign over the messuages and premises therein mentioned as a further security; and that *Etches* had agreed to advance her a further sum of 50*l.* in consideration of the premises; *Margaret Williams* conveyed to *George Etches*, his heirs and assigns, all that piece of land with the messuage and buildings now in the occupation of *Margaret Williams*, (setting out the parcels nearly in the same terms as in the mortgage deed of October, 1808.) The counsel for the plaintiff contended, that as *Margaret Williams* had only an equitable estate at the time of this conveyance, it was not admissible in evidence to shew a legal estate in the defendant. The learned judge ruled, that as *Margaret Williams* was one of the lessors of the plaintiff the evidence was admissible, unless the demise by her was abandoned. The counsel for the plaintiff elected to do so. The defendant contended that the evidence was still admissible, as a declaration by a *cestui que trust*, who was beneficially interested in the result of the suit. The learned judge, however, refused to admit it, and the verdict passed for the plaintiff on the demise of *Jeremiah Williams*.

*Nevile* having obtained a rule nisi for a new trial, on the improper rejection of evidence (*a*),

*Cresswell* and *Cowling* shewed cause in Easter term last (*b*). The question at the trial was, whether the property in dispute passed under the mortgage by *Jeremiah* or *Michael Williams*, in 1808, or not; the jury found that it did not. It is now contended, that a deed by *Mrs. Williams* was admissible in evidence as a declaration of a *cestui que trust*;

(*a*) See 1 N. & P. 8.

man C. J., *Littledale*, *Patteson*

(*b*) May 5, before Lord Den- and *Coleridge*, Js.

but there is no authority to warrant such a proposition, more especially when the *cestui que trust* has only a partial interest in the estate. It is quite clear that a *cestui que trust* cannot by any act alien the property vested in the trustee; how hard then it would be on those in remainder, if his declarations were allowed to have that effect? [Lord Denman C. J. Suppose the trustee takes the estate in trust for the *cestui que trust* in fee, would not the declarations of the latter be admissible?] It is submitted, even then, that they would not. But, in the present case, the *cestui que trust* has only a life estate, and her rights are not at all co-extensive with those of her trustee. If her declarations are admissible now, they would be admissible in an action after her death; in an action brought for the benefit of those in remainder, and would bind them. A *cestui que trust* could not be witness in an action of ejectment for a defendant, against her trustee; then how can it be permitted that her declarations shall be received to prove that indirectly, which the law does not allow to be done directly? As soon as it was determined at the trial, not to proceed on the demise of Mrs. Williams, her declarations were no more admissible than those of any other stranger to the record.

1838.

Doe  
v.

WAINWRIGHT.

First point:  
The declarations of a *cestui que trust* not admissible in evidence against the trustee.

*E. Perry, contra.* It is submitted, 1st, that the declarations of a *cestui que trust* were admissible in evidence against the trustee in an action brought on her behalf; 2d, that the deed, as an act done by a person in possession, was admissible on a question of parcel or no parcel. I. The other side are driven to contend, that the declarations of a *cestui que trust* would never be admissible, even though his interest is co-extensive with his trustees; but it is laid down distinctly in the books, that the admissions of parties beneficially interested in the suit, are admissible against the nominal plaintiff. Thus Mr. Starkie says, 2 Ev. 23, "the admissions of the party really interested, although he be no party to the suit, are evidence against him; for the law, with a view to evidence, regards the real parties," and he collects the authorities for the proposition. So, in *Gilbert's Law of Evidence*, 121,

First point.

1838.

Doe  
v.

WAINWRIGHT.

(4th ed.) it is laid down, that the law of England takes notice of the equitable interest of a *cestui que trust*, so as to exclude him, as well as the trustee, from giving evidence in his own favour. It is said that Mrs. *Williams* could not be called as a witness for the defendant, and therefore that her declarations ought not to be received; but this is the very ground on which the declarations of a party to the suit are admissible. In *Fenn v. Granger*(a), Lord *Ellenborough* ruled, that the lessor of the plaintiff could not be called as a witness for the defendant, although no evidence was offered on his demise; and therefore it is submitted to follow, as a consequence, that his admissions would be evidence, and the best evidence. It is also said, that it would be very *hard* if the declarations of a *cestui que trust* for life should bind those in remainder, when it is quite clear that her acts could not have that effect; but it is a fallacy to say that it is the declarations of a *cestui que trust* that bind; the question is, what passed by the mortgage of 1808, and to ascertain that fact the admissions of a party, who would otherwise have the estate for life, that it all passed, are the very best evidence that can be given, as being evidently against her own interest. If then it be admitted law, that the declarations of a party beneficially interested in the suit are admissible in evidence, all that remains to be shewn is, that Mrs. *Williams* was interested in the suit; but that appears clearly from looking at the title; for if the lessor of the plaintiff retains the verdict, she takes an estate for life under her husband's will. [Coleridge J. Is there any case to shew that we can receive the declarations of a *cestui que trust* to defeat the interests of those in remainder?] It is submitted, there can be no difference in principle as to the admissibility of the declaration by a party, whether she has an estate for life or an estate in fee (b). The principle on which her declarations

(a) 4 Camp. 177.

(b) In *Res v. Woburn*, 10 East, 395, the Court held, that a rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another,and therefore could not be compelled to give evidence for the adverse parish; and *Le Blanc J.* observed, that if the witness were rejected on the ground of his being a party to the suit, his declara-

are admissible is, that she is the party beneficially interested in the suit. If other parties are interested, their declarations might be receivable also. As to her declarations binding those in remainder, if the action were brought after her death, her declarations would not be admissible, as not being made by the party beneficially interested in the suit. [*Coleridge J.* In *Davies v. Ridge (a)*, Lord Eldon C. J., held, that in an action against two trustees, the admission by one is not evidence against the other.] That is because there is no community in interest between trustees.

1838.  
  
 Doe  
 v.  
 WAINWRIGHT.

II. The deed was admissible as an act done by Mrs. Williams. The question was, what parcels passed by the mortgage deed of 1808. That deed described the premises as now in the possession of *Michael Williams*, and as his possession was afterwards continued in *Margaret Williams*, it became material to consider what her possession consisted of, and any act of her's treating the premises in dispute as parcels of her occupation, is admissible evidence (b). As to the value of the evidence, it clearly might have had some effect on the jury, and therefore the Court will not weigh it in too nice scales; *Crease v. Barrett (c)*.

*Cur. adv. vult.*

LORD DENMAN C.J. now delivered the judgment of the Court:—The question in this case arose on the following state of facts: The lessor of the plaintiff, *Jeremiah Wil-*

tion of any facts touching the matter in issue would necessarily have been evidence against him. In the subsequent case of *Rex v. Hardwicke*, 11 East, 578, it was strongly contested that, although a rated inhabitant might be considered as a party, as the interest of each inhabitant was several, his declarations could not be evidence to charge the others; but the Court held, that it followed as a corollary from *Rex v. Woburn*, that if a party is not liable to be

called upon to give evidence upon oath, as being a party to the suit, his declarations must be evidence for the opposite party. See also *White v. Stanley*, 14 East, 332; and 1 Stark. Ev. 143 n. (a).

(a) 3 Esp. 121.

(b) See *Roll v. Fellow*, Vin. Abr. Evidence, 118, where, on a question of parcel or no parcel, Lord Hardwicke C. J. admitted the deed and declaration of a person who had held under both plaintiff and defendant.

(c) 1 C. M. & R. 919.

1838.

Doe  
v.

WAINWRIGHT.

*liams*, claimed under conveyance of 9th July 1807, by which *Rogers* and *Oldham*, of the 1st and 2nd parts, bargained and sold &c., to *Michael Williams* and himself, of the 3rd and 4th parts in fee, habendum to them and the heirs and assigns of *Michael*, to the use of *Michael* and himself, and the heirs and assigns of *Michael* for ever, in trust, nevertheless, as to the estate of *Jeremiah*, for *Michael*, his heirs and assigns for ever. In October, 1808, *Michael*, of the first, and *Jeremiah*, of the second, mortgaged to *Holden* and *Gordon* of the third part, certain premises, parcel of those above conveyed, and the question in the cause ultimately was, whether the premises sought to be recovered passed by this latter deed; the defendant claiming under it. *Michael*, the mortgagor, died in 1821, having first duly executed a will and devised all his real and personal estate to his wife, *Margaret*, for life. He had continued in possession of the whole property down to his death, and she in like manner had occupied the whole, and continued so to do down to and at the time of her executing the deed next to be mentioned, the propriety of rejecting which, as evidence for the defendant, is the matter now to be determined. It was a deed between *Margaret*, of the first part, *Holden*, *Pye* and *Lepp* (who represented *Holden* and *Gordon*, the mortgagees), of the second, and one *George Etches* of the third. It recited the prior deeds of 1807 and 1808, and the will and death of *Michael*, and was a conveyance in fee of the mortgaged premises, in consideration of the payment of the mortgage money by *Etches*, to *Holden*, *Pye* and *Lepp*, and of the forbearance by him of a prior loan of 100*l.* to *Margaret*, and the further advance to her of 50*l.* The conveying parties were *Holden*, *Pye* and *Lepp*, and *Margaret*, who professed to convey in fee. This deed was tendered in evidence, because it was said that from its language it would appear that the premises in dispute were contained in the mortgage of 1808, and it was contended to be admissible for that purpose, being a declaration by *Margaret* against her interest; for being devisee for life of all the real estate of her deceased husband, an admission that a

certain portion had been mortgaged by him, went to reduce the amount of that, to the beneficial occupation of which she was *prima facie* entitled. Against the reception of the evidence it was argued, that the declarations of the *cestui que trust* for life could only be evidence to affect her own interest, and therefore were receivable against the trustee in those cases only in which the interests were commensurate, and the trustee really suing only for the benefit of such *cestui que trust*, which state of things made the latter substantially the party in the cause; *Hanson v. Parker* (a) is a case of this sort. But that in the present case the trustee was suing for all parties concerned; and this evidence, if received, would be binding on the remainder in fee, which would be in effect to allow the *cestui que trust* for life, to affect by her declarations the estate, which certainly she could not prejudice by her acts; a strange inconsistency, that as an act of conveying, *Margaret* should pass nothing beyond her own interest for life, but that the same instrument, considered as a declaration by her, should operate prejudicially on the remainder in fee.

It is not necessary for us to decide upon the entire soundness of this argument in all its parts. Considering the vast importance of the system of trusts, and how essential a part of that system it is to protect the estates of *cestui que trusts* from the consequences even of their own acts, by the intervention of trustees; the question which this argument raises is one of very serious consideration, and not a little difficulty; upon which at present we express no opinion. But, upon the statement of the facts in this particular case, we cannot see that this was a declaration *clearly* and unambiguously against the interest of her who made it; by saying that certain premises had passed under a previous mortgage, she undoubtedly divested herself of the beneficial occupation of them, until the mortgage was paid off; but at the same time, and by the same declaration, she procures to herself the forbearance of a loan of 100*l.* and

1838.  
  
 Doe  
 v.  
 WAINWRIGHT.

(a) 1 Wils. 257.

1838.

DOE  
v.

WAINWRIGHT.

the advance of 50*l.* more; it is, therefore, a balance of interests. The latter may have been more than an equivalent advantage to what was lost by the former; but whether it were or not, we cannot inquire. If there were an interest both ways, she stood legally indifferent, and the ground on which the evidence was tendered fails. We are of opinion, therefore, on this ground, that the deed was rightly rejected, and the rule must be *discharged*.

Rule discharged.



Wednesday,  
June 13*th*.

WILLIAMS v. WILCOX and another.

1. The right of the public to navigate a public river is paramount to any right of property in the crown, which never had the power to grant a weir so as to obstruct the public navigation, and if a weir, which was legally granted in such a river, caused obstruction at any subsequent time, it became a nuisance.

**TRESPASS** for breaking down and prostrating a certain weir appurtenant to a certain fishery of the plaintiff, in the county of Salop, and for taking away and converting the materials thereof, &c.

2. Weirs erected in

public rivers before the time of *Ed. 1*, although an obstruction to navigation, are legalized by subsequent acts of the legislature.

3. In trespass for destroying a weir in the plaintiff's fishery,—plea of justification that the weir was across part of a public navigable river, and obstructing the navigation of the same; a replication confessing that the locus in quo was part of a navigable stream, but alleging that it was a part of the river wholly distinct from the channel which the public had navigated, and that the said part was not a public navigable river, was held good after verdict, and that it was a sufficient answer in substance to the plea.

Pleas: 1. Not guilty. 2. That the said weir &c. had been wrongfully erected, and placed and set up in and across a part of a certain navigable river called the river Severn, and that the said part of the said river called the Severn, in which &c. was a part of the said river, situate between a certain place, to wit, Worcester, in the county of Worcester, and Shrewsbury, in the county of Salop, and that the said river now is, and at the said several times when &c. was a public and common navigable river for all the liege subjects &c., to navigate and pass with barges on the said river between Worcester and Shrewsbury, and that all &c. before and at &c., of right ought to have navigated and passed,

and still of right ought to navigate and pass with barges in and along the said river from Worcester aforesaid to Shrewsbury aforesaid, at all times of the year, at their free will and pleasure. And the defendants further say, that they the defendants being liege subjects &c. at the said times when &c., had occasion to use the said river, and to navigate and pass in and along &c. with a certain barge of the defendants in going and passing from Worcester aforesaid to Shrewsbury aforesaid, and had passed with the said barge in and along &c., from Worcester aforesaid to the said place in which &c., and because the said weir &c. had, before the said several times when &c., been wrongfully erected &c. in and across the said part of the said river in which &c., and obstructed the same, and because a certain other part of the said river near and adjoining to the said part of the said river in which &c., was at the said times when &c. choked and stopped up, so that without breaking down, prostrating, and destroying the said weir &c., the said defendants could not then navigate or pass with their barge through, over, and along &c., from &c., to &c., as they ought to have done, and because the defendants could not then remove the obstruction in or upon the said other part of the said river which was so choked and stopped up as aforesaid, or pass over or navigate the said part of the said river in which &c., the defendants, at the several times when &c., in order to remove the said obstruction &c., and to enable themselves to pass with and navigate their said barge in and upon the said part of the said river in which &c., broke down &c., and took and carried away the materials thereof to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage &c.; which are the same &c.

Replication to the 2d plea: That true it is that the river Severn was and is a public navigable river, and that the said weir &c. before the said times when &c. had been erected, and placed, and set up, in and across a part of the said river; but the plaintiff says, that the said part of the said river in

1838.

WILLIAMS  
v.  
WILCOX  
and another.

1838.

WILLIAMS

v.

WILCOX  
and another.

and across which the said weir &c. had been so erected &c., was a part of the said river other than and wholly distinct from the channel of the same in which the liege subjects &c., had navigated and passed &c., and lying between the said channel of the said river and the north-eastern bank thereof, and that the said part of the said river, in and across which the said weir &c. had been so erected &c., is not, and at the said several times when &c. was not a public common navigable river for all &c., nor ought &c.; concluding with a verification.


Rejoinder. That the said part of the said river in and across which the said weir &c. had been so erected &c., was part of the river Severn, and that the liege subjects &c., before and at &c., ought of right to have navigated and passed with barges in and along the said part &c., at all times of the year, when and so often as the channel of the said river had been or was choked or stopped up so as to prevent the liege subjects &c. from navigating with barges through, over, or along the said river, except by navigating and passing in, over, through, or along the said part of the said river in which &c., and that the said channel of the said river was, at &c., choked and stopped up so as to prevent &c. Verification.

Surrejoinder. That the liege subjects &c. ought not of right to have navigated &c. in and along the said part of the said river in which &c., when and so often as the channel of the said river had been or was choked or stopped up so as to prevent &c., modo et formâ; concluding to the country; upon which issue was joined.

At the trial at the Shropshire Lent assizes, 1836, before *Williams J.*, it appeared that the plaintiff was the tenant of some land in the parish of Upton, on the north-eastern bank of the Severn, to which an ancient weir, called Preston Weir, for catching fish, was attached. The defendants were barge owners navigating the river Severn. The plaintiff's weir extended from the north-eastern bank of the river to some small islands in the stream, with which it was connected by a strong weir hedge. Between the islands and

the south-western bank was a channel called the Barge Channel, along which the barges were accustomed to pass. This channel was always difficult of navigation in summer, from the shallowness of the stream. In 1809 a local act was passed for making a towing path for horses from Colebrook Dale up the river to Shrewsbury, between which places Preston weir was situated, and trustees were appointed for making and keeping in repair the towing path. By s. 19 of the act, the trustees were authorized to cause all obstructions on the path or sides of the said river to be removed, and the channel of the river to be deepened and kept properly cleansed. The trustees not having cleansed or scourged the channel of the river, it became choked up with gravel, and for many months of the year was impassable for barges. In the winter of 1833 the floods washed away part of the plaintiff's weir hedge, in consequence of which the stream made a passage through, and the current of water thus produced left the usual barge channel more than ordinarily dry. In March, 1834, the defendants forced their barge through the plaintiff's weir, and made a water way, which destroyed the weir as a fishery. The plaintiff contended that the weir had existed since the Conquest, and in proof of his case he produced the following documents: 1. an extract from Domesday Book, in which a "fishery" in the parish of Upton was mentioned: 2. A chartulary of the Abbey of Haghmon, which set forth the grant of the fishery of Upton by *William Fitzallan* to the church of St. John of Haghmon, and which appeared to have been made either in 1172 or 1173. The chartulary also contained a record of Mich. term, 1 Hen. 6, of a verdict of a jury at Salop assizes, on a presentment of the weir as a nuisance, finding that the abbot and all his predecessors, from time whereof the memory of man is not to the contrary, as in right of the church of St. John of Haghmon, have had in the water of Severn one weir at Preston, on the river in the county aforesaid, for taking fish in the same weir at Preston, at every time of the year, and that the aforesaid water of the Severn is not with the said weir

1838.

  
 WILLIAMS  
 v.


 WILCOX  
 and another.

1838.  
 WILLIAMS  
 v.  
 WILCOX  
 and another.

narrowed nor obstructed by the said abbot according to the presentment to any nuisance of the town of Salop or of the county; but that men with vessels and boats, by the course of the water aforesaid, can come to the aforesaid town of Salop as of ancient time and right they have been accustomed to come; and further, they say upon their oaths, that any weirs &c. in the presentment specified, are not newly made since the third year of King *Edward* the 1st, in the form of which the aforesaid abbot had alleged in pleading with the king. 3. An office-copy of the above judgment, by which it appeared that the judgment went by default. 4. A grant from the crown of 5 July, 38 *Hen.* 8, which recited a grant of 20 Sept. 32 *Hen.* 8, to *Edward Littleton*, of the house and site of the abbey of Haghmon, certain woods in Upton, Haghmon and Uffington, together with all fisheries in Upton and Uffington ever enjoyed with the premises. 5. A release dated 30 May, 1651, of the manor of Upton under Haghmon, and of the weir in question. The title was then continued down from that date to the landlord of the plaintiff. The counsel for the defendants objected to the reception of all the documentary evidence shewing the immemorial existence of the weir, on the ground that that was not a fact raised on the pleadings, and that the only issue was, whether the locus in quo was part of the river Severn. The learned judge received the evidence. The chartulary was produced from the muniments of *Mrs. Corbet*, who it appeared was tenant for life of a greater part of the possessions of the abbey of Haghmon, and in whom had been the ownership of the locus in quo up to 1833. It was also objected for the defendant that the chartulary containing the copy of the grant from *William Fitzallan* was not admissible, as it did not appear that any search had been made for the original, but the learned judge admitted it on the authority of *Bullen v. Michel* (a). His lordship then left it to the jury to say whether there had been in very early times a grant of a right of fishery from the crown to the extent of the right claimed by the plaintiff; viz. a

(a) 4 Dow, 297.

right to have his fishery at all times of the year, and to exclude the public, and whether they were satisfied on the evidence that the plaintiff was entitled to maintain his weir hedge so as to exclude the public. The jury found a verdict for the plaintiff.

1838.  
  
 WILLIAMS  
 v.  
 WILCOX  
 and another.

*Maule*, in the ensuing Easter term, obtained a rule nisi to arrest the judgment, on the ground that, as it appeared on the pleadings that the locus in quo was part of a common navigable river, the plaintiff could set up no right under a grant from the crown, implied in a prescription, to obstruct the navigation, the crown having no power to license a nuisance on a highway, whether by water or land; and that even if such a right could exist at common law, it ought to have been pleaded.


He also obtained a rule nisi for a new trial on the improper admission of evidence, viz. of the whole of the evidence relating to the ancient existence of the weir, and also to the copy of the grant contained in the chartulary.

*Talfourd* Serjt. and *R. V. Richards* shewed cause in Michaelmas term last (a). Three objections are made to the verdict obtained by the plaintiff;—first, that under no circumstances can a grant from the crown of a weir be valid which obstructs the navigation of a public river; second, that if such a right can exist in law, it ought to have been pleaded specially; third, on the improper admission of evidence.

I. It is conceded that the crown cannot by any licence or grant authorise any obstruction on a public highway; but the analogy between a public highway and a public river is very faint: the fee of the former is vested in the lords of the soil, of the latter in the crown. The right of passing along a highway exists at all times, and if the road be foundrous, the passenger may go on the adjoining lands.

First point:  
 A grant from the crown of a weir, before *Edw. 1*, valid, although it obstructs a public river.

(a) Nov. 16th, before Lord Denman C. J., *Patterson*, *Williams*, and *Coleridge*, Js.

1838.  
  
 WILLIAMS  
 v.  
 WILCOX  
 and another.

No such right exists with regard to rivers. A river may at certain times cease to be navigable, or be navigable only by aid of towage; but the public in such case are not justified in going on the adjoining banks: *Ball v. Herbert* (a), *Zangers v. Whiskard* (b). *Buller J.*, in the former case, lays down the law distinctly: "*Callis*," he says, "compares a navigable river to a highway; but no two cases can be more distinct. In the latter case, if the way be foundrous and out of repair, the public have a right to go on the adjoining land; but if a river should happen to be choked up with mud, that could not give the public a right to cut another passage through the adjoining lands." The crown therefore being seised of the soil of navigable rivers, before *Magna Charta* could grant weirs either in partial or total obstruction of the right of navigation. On the same principle depended its right to grant a several fishery in a public stream. *Magna Charta*, c. 23, enacts that "all weirs from henceforth shall be utterly put down," which, from the generality of its terms, might seem to include all weirs whatsoever; but subsequent statutes and decisions shew that it only applies to weirs erected in the time of *Edw. 1*, and subsequently. Thus the 25 *Edw. 3*, st. 4, c. 4, enacts "that all weirs which be levied and set up in the time of *Edw. 1* and after, in rivers, whereby ships and boats be disturbed, shall be pulled down;" and this statute was confirmed by 45 *Edw. 3*, c. 2, and 1 *Hen. 4*, c. 12 (c). *Callis* also lays down (d) that *Magna Charta* only relates to weirs "erected without lawful warrant." In the case of *Chester Mill* (e) it appeared that a mill stank of stone had been erected on the river *Dee*, at the city of *Chester*, before the time of *Edw. 1*; but the Court held that *Magna Charta*, c. 23, did not apply to the case, and that the commissioners of sewers had no authority to abate the obstruction to the navigation. That case shews that a distinction was drawn between an obstruction

(a) 3 T. R. 253.

(c) See further 1 *Geo. 1*, stat. 2

(b) MS. Serjt. *Turner*, cited in 3 T. R. 259.

c. 18, s. 18.

(d) *Call*. 256.

(e) 10 Rep. 137 b.

to the navigation, erected before the time of *Edw. 1* and afterwards, as in the latter case, the commissioners would undoubtedly have a right to abate it. So also *Hale De Jur. Mar. 1, c. 5*, points out the right of property in ancient weirs. *Weld v. Hornby (a)* is an illustration of the distinction as to weirs; for as it appeared there that an ancient weir had been enhanced within twenty years, it was held at once to be illegal. *Rex v. Montague (b)* does not touch the present question. The conclusion from the cases is, that an ancient weir, erected before the time of *Edw. 1*, if it be not enhanced or increased, may legally be continued. [*Cole-ridge J.* Do you contend then that before Magna Charta the crown could grant a weir that should totally obstruct the navigation of a public river?] There can be no distinction in the power of the crown to grant a weir on its own soil, founded on its being a partial or total obstruction. Suppose that at the time of the grant the weir was a partial obstruction;—how could the grant be vitiated by becoming, in the course of centuries, a total obstruction? If the right to create any obstruction on a navigable stream ever existed in the crown, as it clearly did, it could not be bounded by a question of more or less. No doubt if the erection be proved to be a new one, as in *Rex v. Clark (c)*, it is presentable as a nuisance.

II. The locus in quo being part of a public navigable river, no doubt the presumption is, that the plaintiff cannot have the power of obstructing the navigation; *Carter v. Murcot (d)*; but he has taken upon himself the burden of proving his exclusive right; and as such a right can exist only by virtue of a grant from the crown before the time of *Edw. 1*, the Court will support the verdict. The question is, not whether the replication might have been demurred to, but whether the Court will not intend that the jury found all the facts which are necessary to support the verdict, ac-

1838.

WILLIAMS  
v.  
WILCOX  
and another.

Second point :  
The replication to a plea of right of way need not plead specially how the way has been stopped.

(a) 7 East, 195.

(c) 12 Mod. 615.

(b) 4 B. &amp; C. 598; S. C. 6 D.

(d) 4 Burr. 2162.

&amp; R. 616.

1838.

WILLIAMS

v.

WILCOX  
and another.

cording to the principle laid down in the note to *Stennel v. Hogg* (a). It is submitted, however, that the mode of pleading is correct. It is not necessary to state in a plea *how* a particular right has been acquired or has ceased. To a plea of right of way, or of common, where the plaintiff relies on the right having ceased, he does not reply it specially, but denies generally the right (b).

Third point:  
On the admis-  
sion of evi-  
dence.

III. The chartulary was clearly admissible, coming, as it did, from the proper custody, as in the case of the chartulary of Glastonbury Abbey; *Bullen v. Michel* (c). [Lord Denman C. J. The objection is not as to the custody, but as to no proof having been given of a search for the original deed.] That objection probably escaped notice at the trial, for it was not taken then.

First point.

*Maule and Whateley*, contra. The crown never had the power to grant a licence for an obstruction on a public navigable stream, either before Magna Charta or since. That statute did not create any new law, but is merely a declaration of the common law of the realm (d), and its words are general, that all weirs shall be put down except those on the sea shore. The highways of the realm, both by land and by water, are called the king's highways; and whether the soil be in the crown or in the adjoining owners, the rights of the subject to free and uninterrupted passage are paramount to any other right that can be created in them. The crown therefore never could make such a grant of its property in the highway as should interfere with this paramount right. The argument for the plaintiff depends on the position that the soil in public navigable rivers belongs to the crown; but this argument would cover a right to stop up the sea, if it were possible, as the soil of that also is in the crown: *Hale*, D. J. M. (e). When *Buller J.*,

(a) 1 Wms. Saund. 227, n. (1).

(c) 4 Dow, 297.

(b) See *Davison v. Gill*, 1 East, 64; *Arlett v. Ellis*, 9 D. & R. 897;

(d) As to this, see 1 Inst. 3.

1 Wms. Saund. 103 b, n. (3).

(e) Hargr. Law Tr. 11.

in *Ball v. Herbert* (a), denied the analogy between a public river and a highway, it was from penury of language, as he was only considering the right to go on the banks of a river for towage. In fact, the two cases are strictly analogous, though not identical. And although it is laid down in the case of *the Banne* (b) that a navigable river belongs to the crown, so far as the tide flows and reflows, that position must be taken with exceptions, as appears in the case of *The Severn* itself (c). But in whomsoever the property of the soil may be, it is subordinate to the rights of navigation. For instance, if a river changes its course, and forms a channel through private property, the right of passing and repassing would instantly accrue (d); à fortiori therefore the right of setting a weir must yield to the common right of navigation. In *Anonymous* (e) the subordinate nature of the right of fishery to the general right of navigation on a public stream, is clearly illustrated. The crown therefore never had the power to authorise an obstruction to a highway; and so it has been laid down: *Thomas v. Sorrell* (f). It is true, with respect to the enactment in Magna Charta, that it only applies to certain open weirs; *case of Chester Mill* (g); and that the subsequent statutes, 25 *Edw.* 3, st. 4, c. 4, 1 *Hen.* 4, c. 12, recognize the valid existence of weirs erected before the time of *Edw.* 1. But those statutes recognize only such weirs as existed without impediment to navigation. If they were enhanced or increased, then the statutes operated to abate them; but if they were already of sufficient height to impede the navigation, they were presentable, however long they had existed. *Glauville*, in a passage cited by *Coke* (h), lays down that any obstruction on a public river was a *purpresture* at common law (i).

1838.

WILLIAMS

v.

WILCOX  
and another.

(a) 3 T. R. 253.

(b) Sir J. Davis, 55.

(c) See Hale, D. J. M. Harg.  
Law Tr. 18, 21.(d) See 1 Roll. Abr. Chimin,  
A. (2).

(e) 1 Camp. 517, n.

(f) Vaugh. 340.

(g) 10 Rep. 137 b.

(h) 2 Inst. 38.

(i) A *purpresture*, which is an encroachment on the king's demesnes or highway, by land or water, Co. Litt. 277 b, may or may

1838.


  
WILLIAMS

v.

WILCOX  
and another.

And that this was always the law clearly appears by the record of Mich. 1 *Hen. 6*, given in evidence by the

not amount to a nuisance. A weir in a public river, whether an obstruction to navigation or not, would be a purpresture, and might be abated, like other encroachments on the crown; see Com. Dig. Purpresture; but if it amounted to a nuisance, it was indictable at common law, according to Sir *Matthew Hale*, although it might have been founded on a grant from the crown. After pointing out that the exception in *Magna Charta* of weirs on the sea coast, and likewise frequent examples, shew that there might be private interests in weirs, he lays down,—“but yet this that I have said must be taken with this alloy; first, that this interest or right in the subject must be so used as it may not occasion a common annoyance to passage of ships or boats, for that is prohibited by the common law and those several statutes before mentioned.” *Hargr. Law Tr.* 22. He also cites a record of the K. B., 14 *Edw. 1*, to shew that a subject might, by prescription, have a weir in the sea, but yet that if it were a nuisance to the passage of ships, it might be abated. *Ib.* 40. Again, after laying down that a subject might have the property of a public navigable river running within his manor, (which the barons of Berkley established as to the river Severn,) he states that this caution is to be added,—“that the people have a public interest, a *jus publicum* of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exac-

tions, as shall be shewn when we come to consider of ports: for the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects; as the soil of a highway is, which, though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.” *Ib.* 36. From the earliest times a navigable river has been considered a highway; 19 *Ass. 6*; 22 *Ass. 93*; *Noy*, 103; Com. Dig. *Chimin*; 13 *Rep.* 33; and as such is included by Serjt. *Hawkins* under that title; and he lays down that the doing any act which renders it less commodious to the king's people is a public nuisance at common law; 1 *Hawk. P. C.* 366—404 (6th ed.). Nor does the decision in *Ball v. Herbert*, 3 *T. R.* 253, clash with this doctrine; for the right of going upon the adjoining lands, in the case of a foundurous road, is clearly inapplicable to a river, and was probably founded on the duty of the adjoining owner of the soil (as one of the parishioners) to repair the highway. A nuisance at common law cannot be prescribed for; *Fowler v. Sanders*, *Cro. Jac.* 446; nor could it be licensed by the crown under its dispensing power; *Thomas v. Sorel*, *Vaugh.* 340; it is only therefore by legislative enactment that it can be made lawful. The civil law agrees with this: “si quis a principe simpliciter impetravit, ut in publico loco ædificet non


plaintiff. It appears by that, that the Abbot of Haghmon pleaded not only that the weir existed by prescription, but also that it was no obstruction to the navigation of the Severn; and the jury found accordingly. The principles of pleading were thoroughly understood in that day; and if a prescription in the weir had been a sufficient defence, the plea would have been bad for duplicity. The statutes which are referred to, to shew that weirs erected before the time of *Edw. 1* are legal, viz. 25 *Edw. 3*, st. 4, c. 4; 45 *Edw. 3*, c. 2; and 1 *Hen. 4*, c. 12, have no such effect. They were passed to remedy particular grievances, and they gave summary powers to the sheriffs and commissioners therein named to put down weirs erected after a certain period. The 25 *Edw. 3*, st. 4, c. 4, is the most important of these statutes, and it is evident from the terms of it that it only refers to such weirs and obstructions as had been set up in the reign of *Edward 1* and subsequently. These, it directs "the sheriffs of the places where need shall be to survey and inquire, and do thereof execution." The 45 *Edw. 3*, c. 2, and 1 *Hen. 4*, c. 12, only give additional summary powers to abate these nuisances, and it was probably conceived that such powers might be given safely over weirs erected in comparatively recent times. Weirs erected before that time, whether by right or wrong, were left to the process of common law; and Lord *Ellenborough's* judgment, in *Weld v. Hornby (a)*, shews what the common law doctrine, as to weirs generally, is. On this point therefore the defendant would be entitled to judgment, if leave had been granted at the trial.

II. At all events the plaintiff cannot have judgment on Second point.

est concedendum sic ædificare, ut cum incommodo alicujus id fiat neque sic conceditur nisi forte quis hoc impetraverit:" D. XLIII. 8, 2. It may be observed that the Roman law did not allow an exclusive right of fishery in a public stream to be gained by prescription; D. XLIV. 3, 7. With re-

gard to the nuisance created by an ancient weir in a public river, it may be observed that the Court will not intend that it had been made before the time of *Edw. 1*; *Inhabitants de Oldberry v. Stafford*, 1 Sid. 145.

(a) 7 East, 195.

1838.  
  
 WILLIAMS  
 v.  
 WILCOX  
 and another.

1838.

WILLIAMS  
v.  
WILCOX  
and another.

this record: for it is alleged in the plea that the locus in quo is part of a common navigable river, and that the defendant was obstructed in his common law right of passage. It is difficult to say what the construction of the replication is. The pleader probably, having *Weld v. Hornby* (a) before him, thought he could not claim a right to obstruct a navigable river, and he does not, but avers that the locus in quo was not a common navigable river, for all &c. to pass on and navigate. If this is a traverse of a fact in the plea, it is of a fact previously admitted; for the replication confesses the locus in quo was part of the Severn, and that the Severn was a navigable river. The finding of the jury therefore is immaterial, for the issue raised is only of a matter in law. When once the plaintiff admitted that the locus in quo was part of a navigable river, he ought to have shewn on the record some right to exclude the public from any part of it. Lord Fitzwalter's case (b) shews that the public character of a river is *prima facie* evidence against the existence of any privilege. The subject has a right of passage on every part of a navigable river, at his will and pleasure; and if the river change its course, according to the case in the Year Book (c), cited by *Holroyd J. in Rex v. Montague* (d), the public obtains rights on the new course of the stream. It is no defence to an obstruction on a highway to say that there is sufficient room on the residue of it (e). But the replication does not go so far as this; for it does not aver that there was any water-way on the other part of the river.

Third point.

III. With regard to the chartulary, it was clearly inadmissible in evidence; for no proof whatever was given that any search had been made for the original grant. It would probably have been found in the Augmentation Office, or

(a) 7 East, 195.

(b) 1 Mod. 106.


(c) 22 Ass. 93.

(d) 4 B. &amp; C. 598; S. C. 6 D. &amp; R. 616.

(e) See 2 Roll. Abr. 137. "If a man scatters logs on the highway,

and suffers them to remain there, although there may be a passage with winding and turning, still it is a nuisance." 11il. 15 Jac. 1, B. R.; S. C. Cro. Jac. 446. See also *Rex v. Russell*, 6 East, 427.

amongst the muniments of *Mrs. Corbet*. There is no case in which the copy of an instrument has been admitted in evidence without proof of search for the original. The ground expressly put by Lord *Redesdale*, in *Bullen v. Michel* (a), for the reception of the chartulary of Glastonbury, was, that a search had been made, and that the originals could not be found.

1838.  
  
 WILLIAMS  
 v.  
 WILCOX  
 and another.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This was a case tried before my brother *Williams*, at the Shrewsbury Spring assizes for 1836. A verdict passed for the plaintiff for 1s. damages, and the defendants contend that the judgment should be arrested, or a verdict entered for themselves; or at all events, that they are entitled to a new trial on account of the improper reception of evidence objected to. Their objection under the last head appears to be twofold:—first, they deny that any evidence was receivable to shew the antiquity of a weir mentioned in the pleadings; secondly, they object to the admissibility of a particular document tendered for that purpose on a specific ground.

In the view in which we take of this case, it will be necessary to dispose of all these grounds. (His lordship then stated the pleadings.) Subject to the questions upon the evidence hereafter to be discussed, the case between the parties is this: the plaintiff has established the existence of the weir in question, by a royal grant made at some period prior to the time of *Edward 1*; but the weir stands across part of a public navigable river, a part, indeed, not required for the purposes of navigation at the date of the grant, but at the time of the commission of the trespass necessary for those purposes by reason of the residue of the channel having become choked up. He contends that, at the date of the grant, the crown had the power of making it even to the disturbance, or total prevention of the right of navigation by the subject; or that, at all events, it had the power First point.

(a) 4 Dow, 324, 5.


1838.

WILLIAMS  
v.  
WILCOX  
and another.

of making such a grant, if in the then existing state of circumstances it did not interfere with the rights of the subject; and that such a grant, valid in its inception, will not become invalid, by reason of any change of circumstances which may afterwards affect the residue of the channel. This latter point, although argued with much ingenuity, does not present any serious difficulty in our minds, and we may conveniently dispose of it in passing. If the subject (which this view of the case concedes) had by common law a right of passage in the channel of the river, paramount to the power of the crown, we cannot conceive such right to have been originally other than a right locally unlimited to pass in all and every part of the channel. The nature of the highway, which a navigable river affords, liable to be affected by natural and uncontrollable causes; presenting conveniences in different parts and on different sides according to the changes of wind, or direction of the vessel, and attended by the important circumstance, that on no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway, namely, to remove obstructions, clear away sand banks and preserve any accustomed channel; all these considerations make it an almost irresistible conclusion that the paramount right, if it existed at all, must have been a right in every part of the space between the banks. It cannot be disputed that the channel of a public navigable river is a King's highway, and is properly so described; and if the analogy between it and a highway by land were complete, there could be no doubt that the right would be such as we now lay down; for the right of passage in a highway by land extends over every part of it. Now, although it may be conceded that the analogy is not complete, yet the very circumstances pointed out by the counsel for the defendants in which it fails, are strong to shew that in this respect at least it holds, the absence of any right to go *extra viam* in case of the channel being choked, and the want of a definite obligation on any one to repair, only render it more im-

portant in order to make the highway an effectual one, that the right of passage should extend to all parts of the channel. If then, *subject to this right*, the crown had at any period the prerogative of raising weirs in such parts as were not at the time actually required by the subject for the purposes of navigation, it follows from the very nature of a paramount right on the one hand, and a subordinate right on the other, that the latter must cease whensoever it cannot be exercised but to the prejudice of the former. If, in the present case, the subject has not at this moment the right to use that part of the channel on which the weir stands, it is only because of the royal grant, and that grant must then be alleged at its date to have done away for ever, in so much of the channel, the right of the public; but that is to suppose the subordinate right controlling that which is admitted to be paramount, which is absurd. On the other hand, there is nothing unreasonable or unjust in supposing the right to erect the weir to be subject to the necessities of the public, when they should arise; for the right of the public being supposed to be paramount by law, the grantee must be taken to be cognisant of such right, and the same natural peculiarities, and the same absence of any obligation by law on any one to counteract those peculiarities above mentioned, would give him full notice of the probability that at some period his grant would be determined. We do not therefore think that the plaintiff can sustain his second point.

To the first point, on which his case must now rest, two objections are made by the defendants; they deny that by the law of England the crown ever had the power of interfering with the navigation of public navigable rivers; and they contend, secondly, that if any such power existed, and the plaintiff relies upon an exercise of it, that specific exercise should have been replied to the plea, the allegations of which shew *primâ facie* that the weir in question was a wrongful erection. For want of this, they say, the plea has received no answer; it alleges the obstruction of the channel of a navigable river; that is admitted, but no

1838.  
  
 WILLIAMS  
 v.  
 WILCOX  
 and another.

Second point.

1838.

WILLIAMS

v.

WILCOX  
and another.

lawful cause for such obstruction is shewn. We are of opinion, however, that this second objection is not sustainable, and that upon the face of the record a sufficient answer in substance appears to the plea, if the crown had the power of making the supposed grant. It is an elementary rule in pleading, that when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts, which are the means producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, and almost identical with the present, if a trespass be justified by a plea of highway, the pleader never states how the locus in quo became highway; and if the plaintiff's case is that the locus in quo by an order of justices, award of inclosure commissioners, local act of parliament, or any other lawful means, had ceased to be such at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at that time, without alleging the particular mode by which he intends to shew in proof that it had before then ceased to be such. So here the defendants relying on the common law, allege that the weir is wrongfully placed in part of a common navigable river; the plaintiff relying on a ground which, as he contends, in effect took the site of the weir out of the public and navigable channel of the river, properly, as it appears to us, abstains from setting out that grant, and with substantial correctness replies only that that part of the river was other than and wholly distinct from the channel in which the right and user of navigation existed, and was not a public, common navigable river. It is true, that this mode of pleading does not disclose to the defendants the case on which the plaintiff relies; but to object to it on this ground is to misconceive one object of pleading, and to forget another; the certainty or particularity of pleading is directed not to the disclosure of the *case* of a party, but to the informing the Court, the jury, and the opponent, of *the specific proposition* for which he contends; and a scarcely less important object is the bringing the parties to issue on a single and certain

point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point.

Having then thus disposed of the subordinate matters on each side, we come to that on which the argument mainly turned, that is to say, the power of the crown at common law to interfere with the channels of public navigable rivers. On the one side, the contention is, that prior to Magna Charta the power of the crown was absolute over them, and that this weir, by the antiquity assigned to it by the finding of the jury, is saved from the operation of that or any succeeding statute; while, on the other, it is alleged that they are and were highways to all intents and purposes, which the crown had no power to limit or interfere with, and that, as well the restraints enacted by, as the confirmations implied from the statutes alluded to, have nothing to do with the present question. After an attentive examination of the authorities and the statutes referred to in the argument, we cannot see any satisfactory evidence that the power of the crown in this respect was greater at the common law before the passing of Magna Charta, than it has been since. It is clear that the channels of public navigable rivers were always highways; up to the point reached by the flow of the tide, the soil was presumably in the crown; and above that point, whether the soil at common law was in the crown, or in the owners of the adjacent lands, a point perhaps not free from doubt, there was at least a jurisdiction in the crown, according to Sir *Matthew Hale*, "to reform and punish all nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also for smaller as barges or boats."—*De Jur. Maris*. Part 1, c. 2 (a). In either case, the right of the subject to pass up and down was complete; in the case of *the Banne Fishery* (b), where the reporter is speaking of rivers within the flux and reflux of the tide, it is stated that this right was by *the King's*

1888.


  
WILLIAMS

 v.  
WILCOX  
and another.

First point.

(a) Harg. Law Tr. p. 8.

(b) Davis's Rep. 57.

1838.

WILLIAMS

v.

WILCOX  
and another.

*permission*, for the ease and commodity of the people; but if this be the true foundation, and if the same may be also properly said of the same right in the higher parts of rivers, still the permission supposed must be coeval with the monarchy, and anterior to any grant by any particular monarch of the right to erect a weir in any particular river. It is difficult therefore to see how any such grant made in derogation of the public right previously existing, and in direct opposition to that duty which the law casts on the crown, of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law. Nor can we find in the language of the statutes referred to, any thing inconsistent with this conclusion; they speak indeed of acts done in violation of this public right, but they do not refer them to any power legally existing in the crown, which, for the future, they propose to abridge. We are therefore of opinion that the legality of this weir cannot be sustained on the supposition of any power existing by law in the crown in the time of *Edward 1*, which is now taken away.

Fourth point:  
Weirs erected  
before the  
time of *Ed. 1*,  
legalized by  
acts of parliament.

But this does not exhaust the question, because that which was not legal at first, may have been subsequently legalized. The question of fact was submitted to the jury most favourably for the defendants, whether any such grant had been made before *Magna Charta* as the plaintiff relied on, and the jury upon the evidence have found in the affirmative. If, therefore, upon an examination of the statutes relied on by the plaintiff, such a grant, whether valid or not at common law, appears to be saved by their operation, the objection of the defendants falls to the ground. And we think that to be the true construction of the statutes. The learned counsel for the defendants is probably correct in saying, that the 23d cap. of *Magna Charta* may be laid out of the case; the *kidelli* there spoken of, appear from the 2d *Inst.* p. 38, and the *Chester Mill case* (a), to have been open weirs erected for the taking of fish, and the evil intended to be remedied by the statute, was the unlawful destruction of that


important article of consumption. That statute, therefore, being pointed at another mischief, might leave any question of nuisance, by obstruction to the passage of boats, exactly as it stood at common law. But the same remark does not apply to the 25 *Ed.* 3, st. 4, c. 4; that begins by reciting that the common passage of boats and ships in the great rivers of England, is oftentimes annoyed by the enhancing (a mistranslation of the word *lever* for levying or setting up) of gorges, mills, weirs, stanks, stakes, and kiddles; and then provides for the utter destruction of all such as have been levied and set up in the time of *Ed.* 1, and after. It further directs that writs shall be sent to the sheriffs of the places where need shall be, to survey and inquire, and to do thereof execution; and also the justices shall be thereupon assigned at all times that shall be needful. It is clear, we think, that in any criminal proceeding for the demolition of this weir, which had been instituted immediately after the passing of this statute, it would have been a sufficient defence to have shewn its erection before the time of *Ed.* 1; and considering the concise language of statutes of that early period, we think the statute would equally have been an answer in any civil proceeding at the suit of a party injured. Assuming the weir to have been illegally erected before the date of *Magna Charta*, it is not unreasonable to suppose that a sort of compromise was come to; similar nuisances were, probably, very numerous, but they were probably many of them of long standing: it may have been impossible to procure, or it may well have been thought unreasonable to insist on, an act which should direct those to be abated which had acquired the sanction of time, and a line was therefore drawn, which preventing an increase of the nuisance for the future, and abating it in all the instances which commenced within a given period, impliedly legalized those which could be traced to an earlier period. This appears to us the proper effect to be attributed to the statute, and if it be, it disposes of any difference between a criminal and civil proceeding. The earlier weirs were not merely protected against the

1838.

WILLIAMS

v.

WILCOX  
and another.

1838.  
  
 WILLIAMS  
 v.  
 WILCOX  
 and another.

specific measures mentioned in the act, but rendered absolutely legal. If this would have been a good answer immediately after the act passed, it is, at least, equally good now, and therefore of the 45 *Ed.* 3, c. 2, and the 1 *Hen.* 4, c. 12, it is unnecessary to say more, than that they do not at all weaken the defence which the defendants have under the former statute. We are of opinion, therefore, that there is no ground for arresting the judgment, or entering a verdict for the defendants; and the conclusion to which we have come on these points decides, of course, that the learned judge was quite right in receiving evidence of the antiquity of the weir.

Third point.

A single point, however, still remains to be mentioned, on which the defendants claim a new trial. In order to establish the antiquity of their weir the plaintiff tendered in evidence what purported to be a copy of an ancient grant found in a chartulary of Haghmon Abbey; the single objection now relied on against its reception is, that no search was proved to have been made for the original. The note of the learned judge is very specific as to the objections made at the trial, and his memory clear as to what then occurred; but he has no minute or recollection of this point having been pressed, and it is an objection so much upon the surface that if brought clearly to his notice it is scarcely conceivable but that it must have prevailed—indeed, we think, that it must have been acquiesced in by the counsel on the other side. We do not doubt that it was in fact made, but as the whole class of that evidence of which this document formed a single item, was also objected to, and the attention of the learned judge was naturally directed to that more general and important objection, it is probable that this was not so made as to attract his notice. In all cases, and especially in one so circumstanced as this, it is the business of the counsel to take care that the judge's attention is drawn to any objection on which he intends afterwards to rely—justice requires this—not so much to the judge as to the opposite party, who may be willing, as in

the present case would probably have been done, rather to waive the benefit of the evidence, than put his verdict in peril on the issue of the objection. If by inadvertence this was not done at the trial, we think we ought not, either upon general principles or with a view to the particular circumstances of this case, to allow the objection now to prevail. The admitted document was but one of many to prove what in the end was unquestionable and unquestioned, the very great antiquity of the weir; its admission therefore occasioned no injustice, its rejection could not, and ought not, to have varied the verdict. The rule, therefore, on all points, will be discharged.

Rule discharged.



The QUEEN v. ———.

A BILL of indictment had been found at the Middlesex Sessions, 1837, against the defendant, and was removed by him by certiorari into this Court. The first count of the indictment charged the defendant with having made an assault on one *J. S.*, and that he unlawfully, wickedly, and indecently did expose his private parts naked to the sight and view of the said *J. S.*, with a view and intent to incite and provoke the said *J. S.* to commit with the defendant an unnatural offence &c. The second count charged him with a common assault.

At the trial in Middlesex, at the sittings after Easter term, 1837, before Lord *Denman* C. J., the defendant was found not guilty, and his lordship made an order on the treasurer of the county for the costs of the prosecution, under 7 *Geo. 4*, c. 64, s. 23.

This order having been made a rule of Court in the Trinity term following, *J. Addison*, in the same term, obtained a rule calling upon the prosecutor to shew cause why this rule should not be discharged.

1838.

WILLIAMS  
v.  
WILCOX  
and another.

Thursday,  
June 14th.

An indictment for an indecent exposure of the person before one *J. S.* with the intent to provoke him to commit an unnatural crime, which had been removed by the defendant by certiorari, is not within s. 23 of 7 *Geo. 4*, c. 64, so as to enable the Court before whom it is tried to grant the costs of the prosecution.

1838.  
  
 The QUEEN  
 v.  
 ———.

*S. Hughes*, on a former day in this term, shewed cause. The judge before whom this indictment was tried had clearly power to grant costs, under 7 *Geo. 4*, c. 64, s. 23 (a). It has been held, that where an indictment has been removed by certiorari, this Court has no power to award costs; *Rex v. Richards* (b), *Rex v. Johnson* (c); but in those cases the indictment was removed by the prosecutor, and the decisions proceeded probably on the ground that the act was only intended to give costs to poor persons who were bound over to prosecute. This Court has also refused to grant costs where the application had not been made at the time of the trial; *Rex v. Chadderton* (d), *Rex v. The Treasurer of the County of Exeter* (e); but *Rex v. Johnson* (f) is an authority to shew that the Court was authorized to grant costs on an indictment in any Court before whom the trial may lawfully be had. In *Rex v. Clifton* (g), which was an indictment for not repairing a road, the Court awarded costs to the prosecutor, under 13 *Geo. 3*, c. 78, s. 64. So in *Rex v. Jeyes* (h), in which the question was raised on this statute, *Park J.*

(a) S. 23 enacts, "that where any prosecutor or other person shall appear before any Court on recognizance or subpoena to prosecute or give evidence against any person indicted of any assault, with intent to commit felony, or any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property, knowing the same to have been stolen, of any assault upon a peace-officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace-officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of

the person, of wilful and corrupt perjury, or of subornation of perjury, every such Court is hereby authorized and empowered to order payment of the costs and expences of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as Courts are hereinbefore authorized and empowered to order the same in cases of felony."

(b) 8 B. & C. 420; 3 C. 2 Man. & R. 405.

(c) Moo. C. C. 173.

(d) 5 T. R. 272.

(e) 5 Mann. & R. 167.

(f) 4 M. & S. 515.

(g) 6 T. R. 344.

(h) 3 A. & E. 416; S. C. 5 N. & M. 101.

granted the prosecutor his costs on an indictment for riot, and it was held that he had power so to do. In that case the prosecutor was not under recognizances to prosecute, but he and his witnesses were subpoenaed to give evidence, as they were in the present case (a).

1838.  
  
 The QUEEN  
 v.  
 —.

*J. Addison, contra.* This indictment does not fall within the words of the act; it is not for a "wilful and indecent exposure of the person," but for a very different offence, which is not mentioned in s. 24 of 7 Geo. 4, c. 64. Even if it were within the statute the Court has no power to grant costs where the indictment has been removed by certiorari; *Rex v. Richards* (b), *Rex v. Johnson* (c); and it is immaterial whether the removal be by the prosecutor or by the defendant, *Rex v. The Treasurer of the County of Exeter* (d). The case of *Rex v. Clifton* (e), in which the judge gave the prosecutor his costs, under the 13 Geo. 3, c. 78, is no authority here, for the words of that statute gave very large powers to the judge as to costs.

*Cur. adv. vult.*

Lord DENMAN C. J. on this day stated that the Court were of opinion that the case was not within the statute.

Rule absolute.

(a) This fact appeared on the affidavit of the prosecutor.

(c) Moo. C. C. 173.

(d) 5 Man. & R. 167.

(b) 8 B. & C. 420; 3 C. 2 Man. & R. 405.

(e) 6 T. R. 344.

DOE on the demise of BOULTBEE and others v. ADDERLEY.

Thursday,  
 June 14th.

EJECTMENT for a cottage at Gnosal, in the county of Stafford. At the trial before *Littledale J.*, at the Staffordshire Summer assizes, 1836, it appeared that the lessors of

A rated inhabitant is made a competent witness for his parish by 54 Geo. 3, c. 170,

s. 9, in ejectment respecting parish property.

1838.

Doe  
v.

ADDERLEY.

the plaintiff were the churchwardens and overseers of Gnosal, who brought the ejectment to recover the premises in question as parish property. The first witness called was objected to as incompetent, on the ground of his being a rate-payer in Gnosal; and it was admitted by the plaintiff that the same objection applied to the whole of his witnesses. The learned judge thereupon directed a nonsuit to be entered, but ordered the case to be proceeded with, and the verdict passed for the plaintiff.

*R. V. Richards*, in the Michaelmas term following, having obtained a rule nisi to set aside the nonsuit,

First point:

An inhabitant of a parish an incompetent witness at common law, in a suit brought by the churchwardens.

Second point:

Not made competent in actions of ejectment for parish property by 54 Geo. 3, c. 170.

*Ludlow Serjt. and Godson*, on a former day in this term (June 4), shewed cause. There is no doubt that at common law the inhabitants of a parish, being the real parties to the suit brought by parish officers, are incompetent witnesses; *Rex v. Woburn* (a), *Rex v. Hardwick* (b), *Rhodes v. Ainsworth* (c), *Prewit v. Tilly* (d), *Jones v. Carrington* (e).

II. The main question therefore is, whether the 54 Geo. 3, c. 170, s. 9, restores their competency in any other cases than those pointed out by the statute; viz. questions relating expressly to parochial rates and cesses. It is true that in *Meredith v. Gilpin* (f), which was a question as to the title to parish lands, it was held, that the 54 Geo. 3, c. 170, capacitated inhabitants; but that case was disapproved of, and may be considered overruled by *Oxenden v. Palmer* (g). That was a case where the issue was as to a custom for all persons residing within the parish, whose duty it was to repair the parish highways, to take shingle from the beach in aid of the repairs; and the Court held, that persons paying the highway rate within the parish were not made competent by the statute. The establishment of the custom in that case would have gone at once to the diminution of the highway rate, and therefore the question was without

(a) 10 East, 395.

(b) 11 East, 578.

(c) 1 B. &amp; Ald. 87.


(d) 1 Carr. &amp; P. 140.

(e) Ibid. 328.

(f) 6 Price, 146.

(g) 2 B. &amp; Ad. 236.

doubt one relating to the rates or cesses of the parish. The decision of the Court, therefore, must have proceeded on the ground, that the statute only applied to cases where such rates and cesses were directly in issue. In *Marsden v. Stansfield* (a) the inhabitants of a parish were held to have been made competent by the statute; but that was a question as to boundary, which is specifically mentioned in the words of the act. In *Doe v. Cockell* (b), which will probably be relied upon, an ejectment having been brought by parish officers, this Court held, that an inhabitant liable to the poor's rate was a competent witness at common law. But in that case the interest of the inhabitant arising out of his liability to costs, was not brought before the attention of the Court, and the case was substantially decided upon another ground. Besides, it did not appear there that the inhabitants were actually rated. The cases on the other hand, shewing that the statute does not apply to questions of this kind, are numerous. In *Rex v. Bishop's Auckland* (c) rated inhabitants were held not to be rendered competent witnesses by the statute, on an indictment for the non-repair of a highway; and *Oxenden v. Palmer* (d) was confirmed. So in *Tothill v. Hooper* (e), Lord Denman C. J. held, that an inhabitant was not rendered a competent witness by the statute, for an overseer who was defending an action on behalf of the parish. And in some of the cases cited on the first point it was not even contended that the witness was made competent by the statute (f).

1838.  
  
 Doe  
 v.  
 ADDERLEY.

*Talfourd* Serjt. and *R. V. Richards*, contra. *Doe v. Cockell* (b) is an express authority for the admission of these witnesses. The only interest which an inhabitant can have in the suit is with regard to the rates and cesses

(a) 7 B. & C. 815; 1 Mann. & R. 669.

(b) 4 Ad. & E. 478; S.C. 6 Carr. & P. 525.

(c) 1 Ad. & E. 744. See the decisions of *Bolland* and *Alderson*

Be. acc. in the case at *Nisi Prius*, 1 Moo. & R. 286.

(d) 2 B. & Ad. 236.

(e) 1 Moo. & R. 392.

(f) See *Rhodes v. Ainsworth*, 1 B. & Ald. 87.

1833.

DOE

v.

ADDERLEY.

to be made in consequence of the decision, and that interest is removed by the statute. If the decision can have no effect on the rates, then there is no interest to disqualify.

*Oxenden v. Palmer* (a) is a very peculiar case. The interest there related not only to the rates and cesses, but to the personal statute labour of each inhabitant on the highways. The decision in *Rex v. Bishop's Auckland* (b) will be found on examination to be of little weight. The counsel in that case moved for a new trial on the rejection of evidence, and also to arrest the judgment; and as he succeeded on the latter ground, he did not press the first point, in deference to an opinion expressed by one member of the Court. On the other hand, *Meredith v. Gilpin* (c) is a well-considered decision; and it is submitted that the intention of the 54 Geo. 3, c. 170, was to apply a remedy for the whole evil that had occurred in practice. The commencement of section 9 is, that no inhabitant or person rated, or *liable* to be rated to any rates or cesses of any district &c., shall, before any Court or person or persons whatsoever, be deemed to be, by reason thereof, an incomplete witness for or against such district, parish, &c. [*Lit-tledale J.* The legislature goes on to enumerate several instances, such as an order of removal and bastardy cases, in which the only ground of incompetence arises from the liability of the party to an increased rate; and it would appear from the specific enumeration, that only the cases mentioned were contemplated.] The instances are given as examples of the general principle.

*Cur. adv. vult.*

Thursday,  
June 14th.

See the marginal note to the preceding case:

DOE d. BACHELOR and others v. BOWLES and others.

THIS was an ejectment, brought at the same assizes at Gloucester, to recover premises situated at Cowhoney-bourne. The defendants were the churchwardens and

(a) 2 B. & Ad. 236.

(c) 6 Price, 146.

(b) 1 Ad. & E. 744.

overseers of that parish, and on their proceeding to call rated inhabitants for the defence, the same objection was taken as in *Doe v. Adderley*; and *Littledale J.* having rejected them, the verdict passed for the plaintiff.

*Maule*, in Michaelmas term, 1836, having obtained a rule nisi for a new trial,

*Talfourd Serjt. and Godson*, on June 4th, in this term, appeared to shew cause.

*Maule* and *W. J. Alexander*, contra. *Meredith v. Gilpin (a)*, which was decided soon after the passing the 54 Geo. 3, was a well-considered decision by *Holroyd J.* after argument at Nisi Prius, was confirmed in banc, and has never been overruled. *Oxenden v. Palmer (b)*, on the other hand, is a very unsatisfactory decision, in restriction of a beneficial statute. With reference to an observation from the bench, it is submitted that there is nothing to restrict the statute to the instances enumerated. The words at the commencement of sect. 9 are general, "that no person rated, or liable to be rated, shall be deemed to be, by reason thereof, an incompetent witness for or against the parish;" and then instances are added *ex abundanti cautela*. In *Rex v. Hayman (c)*, rated inhabitants were held to be competent witnesses to charge an individual with the repair of a bridge *ratione tenuræ*; and in *Heuderbourck v. Langston (d)* Lord *Tenterden C. J.* held a rated inhabitant to be competent, in an action by the surveyor of highways against his predecessor for penalties. In *Doe v. Cockell (e)* *Alderson B.* admitted a rated inhabitant under the statute at Nisi Prius; and in *Doe d. Harrison v. Murrell (f)*, tried at the Gloucester Summer assizes, 1835, Lord *Abinger C. B.* admitted a rated inhabitant to prove the right of the parish to some premises in question.

*Cur. adv. vult.*

(a) 6 Price, 146.

(b) 2 B. & Ad. 236.

(c) 1 Moo. & M. 401.

(d) 1 Moo. & M. 402, n.

(e) 6 C. & P. 525.


(f) Not reported.

1838.



DOE  
v.

BOWLES  
and others.

1838.  
  
 GREEN  
 and others  
 v.  
 BICKNELL  
 and another.

ants, who were at such meeting appointed trustees of *Field & Thompson's* estate, agreed to pay the plaintiffs whatever debt or damages they would have been entitled to prove in respect of their contracts against the estate of *Field & Thompson*, supposing them to have committed an act of bankruptcy, and a fiat to have issued against them. The question for the opinion of the Court is, whether if *Field & Thompson* had committed an act of bankruptcy on 10th May, 1833, and that they had been duly declared bankrupts, the plaintiffs would have been entitled to prove against their estate in respect of the above contracts. If they should be entitled to make any such proof, could they prove for the said sum of 3472*l.* 1*s.* 3*d.*, or what other sum. Judgment to be entered accordingly.

*Robinson* argued the case for the plaintiffs in Easter term last (a). The plaintiffs would have been entitled to prove for 3472*l.* under a fiat in bankruptcy, being the difference between the contract and the market price on the day when the oil ought to have been delivered. The rule with regard to proveable debts is, that where a breach of contract takes place before the bankruptcy, and the damages can be ascertained without the intervention of a jury, the creditor is enabled to prove his debt before the commissioners: and the policy of the bankrupt law is, that where a trader is stripped of all his property, his creditors ought to come in and prove; *Ex parte Groome* (b). The rule, therefore, ought to be construed liberally. The defendants rely upon *Boorman v. Nash* (c) to defeat the plaintiffs' claim; but unless that case governs the present, the general principles of the bankrupt law must prevail. *Boorman v. Nash* (c) decided, that where a contract to deliver oil on a certain day was not broken till after the defendant's bankruptcy, his certificate was no bar to an action for damages for non-delivery. But

(a) May 1st and 2d, before Lord Denman C. J., *Littledale, Patteson*, and *Coleridge* Js.


(b) 1 Atk. 115; *Whitmarsh* on Bank. 198 (ed. 1811).

(c) 9 B. & C. 145.

that does not govern the present case, in which the breach occurred before the act of bankruptcy: and on another point it is an authority in favour of the plaintiffs, for it decided that the measure of damages in such a case is the difference between the contract price and the market price on the day the contract is broken. In *Hammond v. Toulmin* (a), *Ashurst J.* observed, "that where the plaintiff's demand rested in damages, and could not be ascertained without the intervention of a jury, it could not be proved under the defendant's commission: now here was no precise sum due to the plaintiffs at the time of the defendants' bankruptcy." *Boorman v. Nash* (b) shews that a precise sum was due to the plaintiffs, and that it was only matter of calculation to ascertain its amount. It was once considered that only such claims were proveable before the commissioners as *indebitatus assumpsit* would lie for; but that rule has been long departed from, as in cases on policies of assurance and guarantees. In *Johnson v. Spiller* (c), *Buller J.* said, "It is not to be taken for granted that a demand in trover cannot be proved under a commission of bankruptcy; where the demand can be liquidated it may." So though trespass is the proper form of action for mesne profits, if the party chooses to waive the tort, he may prove his claim before the commissioners for use and occupation (d). *Indebitatus assumpsit* also does not lie to recover stock; *Nightingal v. Devisme* (e). This case, therefore, is fully within the principle of those where it has been decided that a breach of contract to deliver stock on a certain day may be proved before the commissioners; *Utterson v. Vernon* (f), *Ex parte Day* (g), *Ex parte King* (h), *Ex parte Campbell* (i), *Parker v. Ramsbottom* (k). In *Bowles v.*

1838.  
  
 GREEN  
 and others  
 v.  
 BICKNELL  
 and another.

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|---------------------------------------|-------------------------------------|
| (a) 7 T. R. 612.                      | (f) 5 T. R. 539; S. C. 4 T. R. 570. |
| (b) 9 B. & C. 145.                    | (g) 7 Ves. 301.                     |
| (c) 1 Doug. 168, n.                   | (h) 8 Ves. 334.                     |
| (d) See <i>Goodtitle v. North</i> , 2 | (i) 16 Ves. 244.                    |
| Doug. 584.                            | (k) 3 B. & C. 257; S. C. 5 D. &     |
| (e) 5 Burr. 2589.                     | R. 138.                             |

1858.  
  
 GREEN  
 and others  
 v.  
 BICKNELL  
 and another.

*Rogers (a)*, the vendor of an estate was allowed to prove for the difference in price of an estate, which was resold after the bankruptcy. There may be great fluctuations in the value of oil, but the price on a given day is quite as easily ascertainable as that of stocks. *Gainsford v. Carroll (b)* decided, that the true measure of damages for not delivering goods on a certain day, is the difference between the contract price and the price of goods of a similar quality about the day on which they ought to have been delivered. That is in conformity with the second point decided in *Boorman v. Nash (c)*; and *Leigh v. Paterson (d)* shews, that as the vendors had 14 days for the delivery of the oil, the market price on the last of those days must be the measure of the damages. *Startup v. Cortazzi (e)* decides the same point. The case finds expressly that the market price was ascertained on that day; there was no occasion, therefore, for a jury at all. Cases may be cited on the other side against the proveability of the plaintiffs' claim, but they are all referable to two classes; 1st, where the breach has not taken place before the bankruptcy, as in *Ex parte Thompson (f)*, *Ex parte Marshall (g)*, *Ex parte The Lancaster Canal Company (h)*; and 2d, where the precise sum cannot be ascertained without the intervention of a jury.

*R. V. Richards*, contra. It appears conceded, that unless *Boorman v. Nash (c)* is overruled, the defendants must have judgment. That is the only case that applies to the present facts, and the decision in it did not turn upon the fact of the breach in the non-delivery having taken place after the bankruptcy. The measure of damages which has been brought forward cannot be applied by the commis-

(a) 1 Cooke's B.L. 123.

(b) 2 B. & C. 624; S.C. 4 D. & R. 161.

(c) 9 B. & C. 145.

(d) 8 Taunt. 540.

(e) 2 C. M. & R. 165.

(f) Mont. & Bligh, 219.

(g) 2 Dea. & Ch. 589.

(h) 1 Mont. 27.

sioners without a jury. The market price of a commodity may be one, but it is not the only, criterion to determine the value. If in the present case 16,000*l.* worth of oil had been brought into the market on a particular day, no purchasers might have been found, there might have been no price at all; or so large a quantity might have depreciated the market; or the oil might not have been of the best merchantable quality. All these are observations for the jury, which the commissioners could not determine. Contracts for the sale of stock are not at all analogous, because stock has almost as fixed a value as money, is not subject to the fluctuations of the markets, and is always of the same quality. In *Ex parte Campbell* (a) the decision turned entirely on principles of equity. In the cases too of contracts for the transfer of stock, bonds are given with a penalty, and the commissioners lay hold of the penalty, and then are enabled to do justice, by permitting the parties to prove the actual loss sustained. Thus, in *Ex parte Day* (b), the Court, in their judgment, pointed out that the penalty in the bond was a legal debt, which the Court would relieve against on condition of the stock being replaced. With regard to *Bowles v. Rogers* (c), the decision there turned upon the equitable doctrine of the vendor's lien on his estate. As to insurances, no doubt where there is a valued policy it is proveable before the commissioners; but when on a marine policy there is a partial loss, and a dispute as to its amount, there is no instance of an attempt to prove it before the commissioners. It is unnecessary to consider the effect of 6 Geo. 4, c. 16, s. 56, on contingent debts, for this is not a case of a contingency; but with regard to proof where the damages are unliquidated, the general rule is laid down in *Deacon's Bank*. L. 284: "Unliquidated damages, though arising on contract, cannot be proved, if there is any uncertainty in the mode of estimating them." And he cites the

1838.

GREEN  
and others  
v.  
BICKNELL  
and another.

(a) 16 Ves. 244.

(c) 1 Cooke's B. L. 123.

(b) 7 Ves. 301.


1838.  
  
 GREEN  
 and others  
 v.  
 BICKNELL  
 and another.

case of *Banister v. Scott* (a), where the damages arose from a breach of contract in not covering in some houses within a certain time, and for which the amount in damages might have been as easily ascertained as in the present case, but in which case there is no pretence for saying that the amount is proveable. So in *Hammond v. Toulmin* (b), where the defendant sold a ship, with a covenant for a good title; the breach of contract took place before the bankruptcy, and the amount of loss was easily proveable; but the Court decided against the claim as being for unliquidated damages. In *Utterson v. Vernon* (c) the Court held, that if a bankrupt had contracted, before his bankruptcy, to replace stock, without naming any particular day for it, the creditor might prove for it under the commission; but the Court overruled their decision in the following year; *Utterson v. Vernon* (d). Where there is a covenant to indemnify, surely the amount payable is as easily to be ascertained as in the present case; yet in *Atwood v. Partridge* (e), where the defendant covenanted for the due payment by *Robinson* of a premium on a policy of insurance, and *Robinson* failed to pay, and the defendant afterwards became bankrupt, the Court held that the bankruptcy was no bar to the action, as the damages were unliquidated. In *Taylor v. Young* (f), *Abbot C. J.*, after stating that there were certain cases of bonds with a penalty, in which a value could be put on the penalty by computation, and when it might be proved, put it to counsel "whether there was any case which shewed that even where there is a penalty, and the nature of the bond is such that its value cannot be ascertained, the party has ever been allowed to prove under the commission?" *Yallop v. Ebers* (g) goes even further, for there the defendant had covenanted to deliver up to the plaintiff his acceptance, or to indemnify him against it. The defendant having done neither, the plaintiff was sued on his acceptance,

(a) 6 T. R. 489.  
 (b) 7 T. R. 612.  
 (c) 3 T. R. 539.  
 (d) 4 T. R. 520.

(e) 12 Moore, 431.  
 (f) 3 B. & Ald. 521.  
 (g) 1 B. & Ad. 698.

and had to pay the amount; but as he did not pay till after the bankruptcy, the Court held that his claim was for unliquidated damages, and therefore was not proveable under the commission. In *Forster v. Surtees* (a), Lord *Ellenborough* C. J. distinguished between the case of a mere debt and a breach of duty for which an action would lie to recover damages *ultra* the debt. If the plaintiff proceeds on the tort for a breach of duty, the certificate is no bar, *Parker v. Norton* (b); even in the case of selling stock, where it is admitted the damage might be estimated, *Parker v. Crole* (c). It is clear, therefore, from these cases, that as the breach sounded in unliquidated damages, and as there is no clear and unambiguous rule which the commissioners could apply, the claim was not proveable under the commission.

1838.  
  
 GREEN  
 and others  
 v.  
 BICKNELL  
 and another.

*Robinson*, in reply. The authority of *Boorman v. Nash* (d) is not at all disputed. If the breach does not happen till after the bankruptcy, it is admitted that the claim is not proveable, and that disposes of a great class of cases. Where the breach does happen before the bankruptcy, then *Utterson v. Vernon* (e), and the other cases of stock contracts shew, that where there is a fixed rule for ascertaining the amount of damages, the interposition of a jury is unnecessary. [*Patteson* J. With regard to those cases on contracts to replace stock, were they not all cases of loans of stock? for if so there might have been an option to prove for the amount of the stock at the time it was lent, just as in the case of goods sold and not delivered; if the buyer choose to prove under the commission for the money he has actually paid, he may do so.] *Ex parte Campbell* (f) was not a case of a loan of stock, but on a covenant to deliver it on a certain day. With regard to the fluctuation of the markets, it is clear that that occurs with regard to stock

(a) 12 East, 605.

(b) 6 T. R. 695.

(c) 5 Bing. 63.

(d) 9 B. &amp; C. 145.

(e) 3 T. R. 539.

(f) 16 Ves. 244.

1838.

GREEN  
and others  
v.  
BICKNELL  
and another.

as much as in other matters. [*Coleridge J.* The case states that the market price was 51*l.* per ton, but the question is, would that have been so easily ascertained before the commissioners? A case might be stated to this Court on the warranty of a horse, and an agreement might be come to as to its value; but we are to decide now on the general principle, viz. whether questions might not arise before the commissioners which would require a jury?] The market price of any commodity may be as easily ascertained as that of stocks. *Deacon's Bank, L.* 284, has been cited, to shew that unliquidated damages cannot be proved; but that is not so; for in all cases on a *quantum meruit* where an easy rule may be applied they are proveable. As to *Parker v. Norton (a)* and *Parker v. Crode (b)*, it was admitted in those cases, that if the plaintiff had waived the tort and gone upon the contract, he might have proved under the commission. The argument as to the commissioners having laid hold of the bond in the stock cases, in order to admit the proof, cannot be sustained; for the dictum of *Abbot C.J.* in *Taylor v. Young (c)* and *The Overseers of St. Martin v. Warren (d)*, shew that if the damages are contingent, the fact of there being a bond makes no difference. In all the cases cited on the other side there is not a single instance where the breach occurred before bankruptcy, and a simple rule was applicable to ascertain the damages, in which it has been held that the claim was not proveable. [*Patteson J.* In *Ex parte Coming (e)* it was held, that where a contract to replace stock on a certain day had been broken before bankruptcy, the proof might be made in respect of the contract of loan. But if the damage arising from fluctuations in the market is ascertainable, it would not have been necessary to throw it back on the loan. That principle may run through all the cases on the subject in Chancery.]

*Cur. adv. vult.*

(a) 6 T. R. 695.

(b) 5 Bing. 63.

(c) 3 B. & Ald. 521.

(d) 1 B. & Ald. 491.

(e) 9 Ves. 115.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—The question in this case was, whether the difference between the contract price of a cargo of whale oil of merchantable quality, which certain persons had agreed to purchase of the plaintiffs, but had refused to accept, and the market price of the oil at the time of refusal can be proved under a fiat of bankruptcy issued against those persons upon an act of bankruptcy committed subsequent to the refusal. The decision of *Boorman v. Nash* (a), cited on the defendants' behalf, is not decisive of the present case, because there the breach did not take place till after the act of bankruptcy and the commission: but, independently of all authority, we must inquire whether the difference of price before stated, which undoubtedly is the true measure of the damages sustained by the plaintiffs, was a debt due from the bankrupts. In many cases in Chancery proof has been admitted of the value of stock agreed to be transferred at a given day; most of them are cases of loans of stock; but there is one instance of allowing the value of a sum of stock to be proved which was covenanted to be transferred by a marriage settlement. We were strongly pressed with these authorities, as establishing the principle, that any right to recover money or money's worth may be treated as a debt, when its amount can be fixed by calculation. But we think that those cases must be regarded as exceptions to the rule, which is, generally speaking, that no claim of this nature shall be proveable as a debt for which the intervention of a jury is necessary. That it was so here is undeniable, for every one of the data, which form the basis of the calculation, may be denied and disputed, and is the subject of opinion rather than direct decision of facts. And although the case finds the quantity of the oil, and that it was of merchantable quality, and that customary allowances were offered to be made, and what was the market price of oil of that quality at the time of refusal, and that such price was in the knowledge of all parties; yet

1838.

GREEN  
and others  
v.  
BICKNELL  
and another.

(a) 9 B. &amp; C. 145.

1838.

GREEN  
and others

v.

BICKNELL  
and another.

it does not find that any settlement was made or account agreed to by the bankrupts, nor any thing which would have precluded them from disputing every one of those facts before a jury; on the contrary, it states that the bankrupts positively refused to accept or pay for the oil, and no reason is assigned for their so doing. For these reasons we are of opinion that the sum claimed is not a debt, but damages, and cannot be proved; therefore our judgment must be for the defendants, that a *nolle prosequi* be entered.

Judgment for the defendants.

Thursday,  
June 14th.

DOE *d.* MERCERON *v.* BRAGG.

A mortgage deed, to secure 300*l.* and interest, with a proviso for redemption if the mortgagor should repay the sum due, and should pay all rates and taxes which might be imposed on the premises, and containing a covenant also to the same effect, is properly stamped with an *ad valorem* stamp, under 55 *Geo.* 3, c. 184, and does not require the 25*l.* stamp payable on deeds securing a sum of indefinite amount.

**EJECTMENT**, tried before *Coleridge J.*, at the Middlesex sittings in this term. The lessor of the plaintiff claimed under a deed of the 8th March, 1825, whereby the premises in dispute were mortgaged to him by the defendant for 300*l.* The deed, which bore a 3*l.* stamp, contained a proviso for re-conveyance, if the mortgagor should repay the sum of 300*l.* on the 8th March, 1826, with 5 per cent. interest in the meantime, without any deduction or abatement whatsoever, for or by reason of any taxes, charges, assessments, cause, matter or thing whatsoever, now or hereafter to be imposed upon or payable in respect of the premises, or on the principal sum of 300*l.* or the interest, or upon the said *Joseph Merceron*, his executors, administrators or assigns, or any other person or persons, for or in respect of the same, by act of parliament or otherwise howsoever; and also should, in the meantime and until full payment and satisfaction of the said principal sum and interest, pay and satisfy, or cause to be paid and satisfied, all annual and other taxes, rates, duties, assessments, and charges whatsoever, which from time to time should be payable for or in respect of the said premises.

Then followed a covenant by the mortgagor for payment of 300*l.* and interest, and also of all taxes and assessments, in the terms of the proviso above mentioned.

It was objected that the deed was insufficiently stamped, as the proviso and covenant for payment of the taxes and assessments related to an indefinite sum, so as to require a 25*l.* stamp, within the 55 *Geo. 3*, c. 184; and *Halse v. Peters* (a) was cited. The learned judge directed a nonsuit, but reserved leave to move to enter a verdict for the plaintiff.

*Wightman*, on a former day in this term, having obtained a rule nisi,

*Byles* now shewed cause (a). An ad valorem stamp, by the 55 *Geo. 3*, c. 184, (Schedule, part 1, title "Mortgage,") is imposed on mortgage deeds, "where the same respectively shall be made as a security for the payment of any definite and certain sum of money, advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable. And where the same respectively shall be made as a security for the repayment of money to be thereafter lent, advanced or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; other than and except any sum or sums of money to be advanced for the insurance of any property, comprised in such mortgage or security, against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed, whereby any annuity shall be granted for such life or lives; if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be *uncertain and without any limit*," the stamp imposed is 25*l.* "But if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum," the same duty as on a mortgage for such limited sum. Upon the

1838.  
DOE  
d.  
MERCERON  
v.  
BRAGO.

(a) 2 B. & Ad. 807.

(b) June 12th, before Lord Den-

man C. J., *Littledale, Patterson,*  
and *Williams, Jr.*

1838.

Doe  
 d.  
 MURCKRON  
 v.  
 BRACE.

face of this deed the sum to be secured in respect of the rates and taxes is unlimited, so that a 25*l.* stamp was necessary; for the limit must be expressed on the face of the deed; *Halse v. Peters* (a). In that case the premises mortgaged were held on lives; and the mortgage deed, containing a covenant for payment of the premium and costs of insurance upon a particular life for seven years, was held to require a 25*l.* stamp. There the costs of insurance seemed to be merely a personal charge on the mortgagor; but here the amount of rates and taxes is to be added to the mortgage money, and charged upon the estate, so that the present case is much stronger; and the proviso and covenant are not only for payment of taxes in respect of the estate, but also of any collateral tax in respect of the sum lent. *Dickson v. Cass* (b) also, which decided that a 25*l.* stamp was necessary to a bond, given to bankers to secure 1000*l.* to be advanced in the way of discount on bills, and also their charges for commission, is a strong authority for the defendant, and shews that the trivial nature of the charges, which are left undefined, is quite immaterial. In *Doe d. Scruton v. Snaith* (c), a mortgage deed for 3000*l.*, with interest and all expenses of the deed, was held not to be a security for an indefinite amount; but it was a matter of course for the mortgagor to pay those expenses, so that the stipulation respecting them was nugatory. And in *Doe d. Jarman v. Larder* (d), where the 25*l.* stamp was dispensed with, although the mortgagor covenanted to procure a renewal of the term mortgaged, which was determinable on lives, and there was no limitation of the sum to be paid for such renewal, the mortgagee had not, in case of default in that respect, any security on the premises mortgaged.

*Wightman*, contra. The case of *Doe d. Scruton v. Snaith* (c), which was decided after *Halse v. Peters* (a), ought to govern the present case. In *Dickson v. Cass* (b),

(a) 2 B. &amp; Ad. 207.

(b) 1 B. &amp; Ad. 242.

(c) 8 Bing. 146.

(d) 3 Bing. N. C. 92.

and many other cases, the indefinite sum to be secured by the deed, was something over and above the sum lent; and in *Halse v. Peters*(a) there was an advance by the mortgagee of the sum necessary to effect a collateral object, namely, the insurance of a life. Here, however, the object of the stipulation relative to the rates and taxes is, that the mortgagee may receive back his money without loss or diminution; and the rates and taxes are not a collateral matter, but are incidental to the premises mortgaged.

1836.  
  
 Doe  
 d.  
 MERCERON  
 v.  
 BRAGG.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—The plaintiff was nonsuited for the insufficiency of stamp on a mortgage deed, on the authority of *Halse v. Peters*(a), decided in this Court in M. T. 1831. In *Doe d. Scruton v. Snaith*(b), which was decided in H. T. 1832, the Court of Common Pleas took a different view of the point, all the four judges giving their reasons in detail for thinking the stamp sufficient. The former case was not at that time reported, nor brought before the Court of Common Pleas: on the other hand, a decision of Lord Tenterden, in *Pruessing v. Ing*(c), on which that Court mainly relied, does not appear to have been cited in *Halse v. Peters*(a). We are of opinion that the authority of *Doe d. Scruton v. Snaith*(b) ought to prevail.

The objection was, that the mortgage deed was stamped only to the extent of the sum advanced, and did not cover the amount of taxes and rates which might be charged on the premises, and which the mortgagor covenanted to pay, and until payment of which the proviso for redemption was not to operate. This amount is truly said to be uncertain and without limit, and hence the 25*l.* stamp is argued to be necessary instead of the ad valorem stamp. The answer is, that to the amount of those taxes and rates the mortgagee is

(a) 2 B. & Ad. 807.

(c) 4 B. & Ald. 204.

(b) 8 Bing. 146.

1838.  
 }  
 Doe  
*d.*  
 MERCERON  
*v.*  
 BRAGG.

at all events entitled; that he required no stipulation in respect of them; and that the stamp is regulated by the amount advanced or agreed to be advanced. This distinction is made clear by the chief justice's remarks in *Doe d. Scruton v. Snaith (a)*.

We are therefore of opinion that the rule for setting aside the nonsuit, and entering the verdict for the plaintiff, must be made absolute.

Rule absolute.

(a) 8 Bing. 146.

Thursday,  
 June 14th.

DOE *d.* JAMES HINTON BAVERSTOCK *v.* ROLFE.

1. Tenant for life and tenant in remainder of a copyhold suffered a recovery, and declared uses on the surrender, which, as a voluntary conveyance, were void as against a purchaser:—Held, that the recovery itself was not therefore void, but that it operated so as to give them the fee by way of resulting use.

**EJECTMENT** for lands in the parish of Clavering cum Langley, in the county of Essex. At the trial at Chelmsford, at the Essex spring assizes, 1836, before *Vaughan J.*, it appeared that the lessor of the plaintiff claimed certain freehold and copyhold lands as the heir of *Mrs. Jane Baverstock*, who died in 1835. The defendant claimed under one *John Letch*, who purchased the lands in 1776. The plaintiff's claim to the freehold was abandoned: the plaintiff's title to the copyhold lands was as follows:

2. *A.*, tenant for life of a copyhold, *B.* his daughter, who had five children living, being tenant in tail in remainder, joined in a recovery in 1778, and, in alleged pursuance of his marriage articles, *A.* surrendered to the use of himself for life, remainder to the use of *B.* for life, remainder to the right heirs of the survivor: *A.* and *B.*, within two or three weeks of the surrender, conveyed the fee to a bona fide purchaser. The contingent remainder terminated in favour of *B.*, in 1802, and in 1835 she died. *B.*'s son thereupon brought ejectment against the purchaser, who had been in possession since 1778, on the ground that a contingent remainder having been created, it could not pass by the surrender of 1778:—Held, first, that as no contract with *A.* appeared on the face of the transaction, and the settlement was not made with a view to the interests of *B.*'s children, the Court would not infer that a contract actually existed that *A.* should join in the recovery, on the consideration of having a contingent remainder in the fee limited to himself, and therefore that the uses were void, under the 27 *Eliz. c. 4*, against a bona fide purchaser; second, that as the surrender passed *B.*'s life estate, the claim to the fee did not accrue till her death, in 1835.

3. An heir, on whom a contingent remainder in a copyhold has devolved, may bring ejectment before admittance.

In 1732 the Rev. *Francis Bridge* died seised of the copyhold lands, leaving his two daughters, *Mary*, wife of *Edward Hinton*, and *Sarah*, wife of *Philip Betts*, his co-heiresses.

1838.

DOE  
v.  
ROLFE.

The title as to *Mrs. Hinton's* moiety was as follows :

19th May, 1746. At a court then held for the manor of Clavering cum Langley, reciting that at a court held the 29th June, 1732, *Mary*, the wife of *Edward Hinton*, clerk, as one of the daughters and coheirs of *Francis Bridge*, clerk, deceased, was admitted, to her and her heirs, to a moiety of the copyholds; and the said *Edward*, and *Mary* his wife, then surrendered the said premises to the use of the said *Mary* for life; remainder to the use of *Edward Hinton* for life; remainder to the use of the heirs of the said *Mary* by *Edward Hinton*; remainder to the use of her right heirs for ever: Now at this court it was presented that the said *Edward Hinton* and *Mary* his wife are both dead, and that *Martha Hinton* is their only child and heir; whereupon the said *Martha Hinton* was then admitted to the said moiety to her and the heirs of her body.

1st August, 1746. At a court held this day *Martha Hinton* surrendered, and suffered a recovery; and the demandant surrendered the said moiety to the use of the said *Martha Hinton* until her marriage, then contemplated, with *John Hinton*, clerk, and immediately after this marriage to the use of the said *Martha Hinton* for life; to the use of the said *John Hinton* for life; to the use of the children of the said marriage, according to appointment, and in default thereof, to the use of the heirs of the body of the said *Martha Hinton* by the said *John Hinton*; with ultimate remainder to the right heirs of the survivor of the said *John* and *Martha Hinton*: whereupon, at the said court, *Martha* was admitted tenant of the said moiety, according to the said surrender, to hold to her and her heirs, until the said marriage should take place, and immediately after the solemnization to her use for life.

4th June, 1762. At a court then held, after reciting the

1838.  
  
 Doe  
 v.  
 Rolfe.

last admission, it was presented that the said marriage had taken place, and that the said *Martha Hinton* was dead; whereupon *John Hinton* was admitted for life.

16th May, 1778. At a court then held, reciting the two last admissions, the said *John Hinton* informed the court that *Martha Hinton*, his late wife, had not made any limitation or appointment of the said premises, and that she had left *Jane Hinton* and *Martha Hinton* (then infants) the only heirs of her body; and that the said *Martha*, the daughter, died an infant; and that the said *Jane*, his eldest and then surviving daughter, was the wife of *James Baverstock*: whereupon the said *Jane Baverstock* prayed to be, and was admitted to this moiety, to hold from the decease of the said *John Hinton* to her and the heirs of her body.

The title as to the other moiety was as follows:—

19th May, 1758. At a court then held, reciting that at a court held on the 26th May, 1740, it was presented, that on the 11th January last past, *Philip Betts* and *Sarah* his wife, customary tenants of the manor aforesaid, surrendered into the hands of the lord all that moiety, &c., and reciting that at a court held on the 3rd June, 1757, it was presented that the said *Sarah Betts* had been dead several years, and that the said *Philip Betts* had died since the last court; and that the said *Edward Hinton*, and *Mary* his wife, were also both dead; and that *Martha*, wife of *John Hinton*, was their only child and heir: Now at that court the said *Martha Hinton* was admitted tenant to the said moiety, descended to her as aforesaid, to hold to her and her heirs.

4th June, 1762. At a court then held, after reciting that the said *Martha Hinton* had died seised of the said moiety, and that *Jane Hinton* and *Martha Hinton*, both infants, were her only daughters and coheirs,—the custody of the said infants, and of the aforesaid moiety, was granted to *John Hinton*, their father; and thereupon the said *Jane Hinton* and *Martha Hinton* were admitted tenants to the said moiety, to hold one moiety thereof to the said *Jane*

and her heirs, and the other moiety to the said *Martha* and her heirs.

7th July, 1777. At a court then held, reciting the death of the said *Martha Hinton* under the age of twenty-one years, and that *Jane Baverstock* was her only sister and co-heir, the said *Jane* was thereupon admitted to one undivided fourth part (viz. to *Martha's* moiety), to her and her heirs.

16th May, 1778. At a court then held, *James Baverstock* and *Jane* his wife, (the said *Jane* being first separately examined,) in performance of the covenants on the part of *Martha Hinton*, mother of the said *Jane Baverstock*, contained (a) in a certain indenture of release and settlement, of 31st July, 1746, made between *Martha Hinton*, then *Martha Hinton*, spinster, of the first part—the said *John Hinton*, clerk, her then intended husband, of the second part—and the Rev. *John Maryon* and the Rev. *Robert Eyre*, of the third part,—surrendered the said moiety

To the use of the said *John Hinton*, the father of the said *Jane Baverstock*, for life;

To the use of the said *Jane Baverstock*, the only surviving issue of *Martha Hinton*, and the heirs of her body;

To the use of the heirs of the said *John Hinton* for ever:

Whereupon the said *John Hinton* and *Jane Baverstock* were admitted tenants to the said surrendered moiety, to hold as aforesaid.

The two moieties having now coalesced, the title was as follows:—

16th May, 1778. At a court then held, it was presented that immediately after the last admission came *John Hinton*, clerk, and *James Baverstock*, and *Jane* his wife, and surrendered *all* the said premises

To the use of *Joseph Wornwell* and his heirs, who was thereupon admitted, to make him a tenant to the præcipe, in order that a recovery might be suffered; to hold to him and his heirs for ever; and immediately afterwards, at that

1838.

DOE  
v.  
ROLES.

(a) See *post*, 653.

1838.

DOE

v.

ROLFE.

court, a recovery was suffered against the said *Joseph Wormwell*, with voucher by *James Baverstock* and *Jane* his wife, and *Benjamin Sealey* (the demandant) was thereupon admitted to the said premises; and at the same court the said *Benjamin Sealey*, *Joseph Wormwell*, *John Hinton*, *James Baverstock*, and *Jane* his wife (she being again privately examined), surrendered the aforesaid premises, so recovered to the lord, to the use of the said *John Hinton* and his assigns for life; to the use of *Jane Baverstock* and her assigns for life; and after the death of the said *John Hinton* and *Jane Baverstock*, and the survivor of them, to the use of the heirs of the survivor;

And the said *John Hinton* and *Jane Baverstock* were thereupon admitted, according to the effect of the last surrender; and at that same court the said *John Hinton*, in pursuance of his covenants in an indenture of 9th October, 1769, between *John Hinton*, of the first part—*James Baverstock*, of the second part—and *Charles Blackstone* and *Thomas Baverstock*, of the third part,—being the marriage settlement of *Jane Hinton*, the daughter of the said *John Hinton*, with the said *James Baverstock*, and also the said *James Baverstock* and *Jane* his wife, surrendered into the hands of the lord one undivided moiety of all the premises;

To the use of the said *Charles Blackstone* and *Thomas Baverstock*, in trust for the use of the said *James Baverstock* for life, in trust for the use of the said *Jane Baverstock* for life, in trust for the use of *Thomas Baverstock* (eldest son of *James Baverstock*; by *Jane* his wife), *John James Baverstock*, *Jane Baverstock*, *Mary Baverstock*, and *Frances Baverstock*, and all such other children of the said *Jane*, the wife of the said *James Baverstock*, by the said *James Baverstock*, in such shares as the said *James* and *Jane Baverstock* should appoint; and in default of such appointment,

In trust for the use of the said children in tail male, with ultimate remainder to the heirs of the said *Jane Baverstock* for ever;

With power to the said *Charles Blackstone* and *Thomas Baverstock* to sell all the aforesaid moiety, and to buy other


lands of equal value, to be held subject to the same uses; and thereupon, at that court, the said *Charles Blackstone* and *Thomas Baverstock* were admitted to the said moiety, according to the terms of the last-mentioned surrender.

The defendant's title was as follows:

30th and 31st July, 1746. By indentures of lease and release, made between *Martha Hinton* of the first part, (maternal grandmother of the lessor of the plaintiff,) the Rev. *John Hinton* of the second part, and trustees of the third part; after reciting a marriage about to take place between the said *Martha Hinton* and *John Hinton*, the said *Martha Hinton* conveyed to the trustees certain freeholds, to the use of *John Hinton* for life; remainder to the use of *Martha* for life; remainder to the use of such child of the marriage as *Martha* should appoint; remainder to the use of the heirs of *Martha Hinton* by *John Hinton*; remainder to the use of the heirs of the survivor of the said *John* and *Martha Hinton*; and

She further covenanted to surrender that moiety of the copyhold which she had in possession (a), and also her remainder, expectant on the decease of *Philip Betts*, in the other moiety, to the same uses as the freeholds.

9th October, 1769. An indenture, made between *John Hinton* of the first part, *James Baverstock* of the second part, and *Charles Blackstone* and *Thomas Baverstock* (as trustees), of the third part; after reciting that the interest in the copyhold premises, subject to the life estate of *John Hinton*, had become vested in *Jane Hinton* and *Martha Hinton*, and that a marriage was then contemplated between the said *Jane Hinton* and *James Baverstock*, and that *John Hinton* had agreed to surrender all his interest in a moiety of the said copyholds, unto the said trustees in trust, the said *John Hinton* then covenanted that he would, within six months after the said *Jane Hinton* should arrive at the age

1838.  
  
 DOK  
 v.  
 ROLFE.

(a) See the surrender of one moiety accordingly, *ante*, 649, and the surrender by her daughter, Mrs. *Baverstock*, of the other moiety, *ante*, 653.

1838.

DOE  
v.  
ROLFE.

of twenty-one, convey unto the said trustees (inter alia) a moiety of the said copyhold lands to the use of the said *James Baverstock* for life; remainder to the use of the said *Jane Hinton* for life; remainder to the use of such child or children of the said *Jane Hinton*, by *James Baverstock*, as the survivor of them should appoint; and in default thereof, to the use of the heirs of *Jane Hinton* by *James Baverstock*; with ultimate remainder to her own right heirs. This deed contained a proviso that the trustees, on the request of the said *James Baverstock* and *Jane* his wife, might sell or exchange the settled lands for others of equal value.

29 and 30 May, 1778. By indenture of lease and release, the release made between *John Hinton* of the first part, *James Baverstock* and *Jane* his wife of the second part, *Charles Blackstone* and *Thomas Baverstock* of the third part, and *Benjamin Sealey* of the fourth part, reciting the said articles of 9th October, 1769, and that the marriage therein contemplated had taken place, and that there were two sons and three daughters of this marriage then living, and that no settlement had been made in pursuance of the covenants therein contained: it was witnessed, that the said *John Hinton*, in pursuance of his covenant for settling the said moiety (inter alia), conveyed the same to the said trustees, and for barring, destroying, and extinguishing all estates tail &c., a fine (as to the freehold) was levied; and reciting, that at a court held on the 16th May then instant, *John Hinton*, in pursuance of the covenants in the said articles contained, and said *James Baverstock* and *Jane* his wife, surrendered the copyhold premises, held of the said manor, (a good and perfect recovery of the entirety of the said copyhold premises having been previously suffered at the same court,) to the use of the said trustees in trust; viz. to the use of *James Baverstock* for life, remainder to the use of *Jane Baverstock* for life, remainder to the use of the five children then alive, and other children to be born, as they should appoint, and in default thereof, to *Thomas Baver-*

*stock*, the eldest son in tail, remainder to the second and other sons successively in tail, with ultimate remainder to the right heirs of *Jane Baverstock*. This settlement also contained a proviso and power for the trustees, on the request of *James* and *Jane Baverstock*, to sell any part of the settled lands, and to lay out the proceeds on lands of equal value, and that the said *John Hinton*, *James Baverstock*, *Charles Blackstone*, and *Thomas Baverstock*, might at any time revoke the uses then created, and create others.

1 and 2 June, 1778 (a). By indenture of lease and release of this date, the above-mentioned settlement was recited, and also that it had been thought for the benefit of the said *James Baverstock* and *Jane* his wife, and their issue, to sell the said moiety of freehold and copyhold lands so vested in the said trustees, and that the said *John Hinton* and *James Baverstock* had agreed with *John Letch* for the sale to him of the said moiety so vested in the trustees as aforesaid, and of the other moiety of the said premises, to which *John Hinton* was entitled for life, for the sum of 2020*l.*, and that *James Baverstock*, in order to enable him to carry said agreement into execution, and in pursuance of the condition in the said settlement contained, for assuring unto the said trustees other premises of equal value with the lands settled, proposed to convey to them the premises thereafter mentioned (being of superior value to the settled lands). The deed then conveyed certain estates at Alton, in Hants, to the trustees, to the same uses as those contained in the settlement of 1778.

24th and 25th June, 1778. By indentures of lease and release, made between *John Hinton* of the first part, *James Baverstock* and *Jane* his wife of the second part, *Charles Blackstone* and *Thomas Baverstock* of the third part, *Benjamin Sealey* of the fourth part, and *John Letch* of the fifth part; reciting the indentures of 30th and 31st July, 1746, of the 29th and 30th May, 1778, and of the 1st and 2d

(a) This deed was not put in evidence at the trial, but it was referred to in the argument in this Court.

1838.



DOE  
v.  
ROLFE.

1838.

  
 Doe  
 v.  
 Rolfe.

June, 1778, and reciting that, in part performance of the said agreement, the said *James Baverstock* and *Jane* his wife did, on the 20th of May last, surrender the copyhold held of the manor of Curles (a), it was witnessed, that in further performance of said agreement, and in consideration of 2020*l.*, paid by the said *John Letch* for the entirety of the said freehold and copyhold premises, the said trustees, and *James Baverstock* and *Jane* his wife, bargained, sold, granted &c. one moiety of freehold premises &c., and the said *James Baverstock* covenanted that the said trustees, at the next court day of the manor of Clavering, should surrender all that moiety of the said copyholds held of the said manor, and that *John Hinton* and *James Baverstock* and *Jane* his wife, would surrender all the other moiety of the said copyhold, to the use of the said *John Letch*; his heirs or assigns.

27th June, 1778. At a court then held for the manor of Clavering, *Charles Blackstone* and *Thomas Baverstock* surrendered one moiety of the said copyhold, and *James Baverstock* and *Jane* his wife released to *John Letch* in fee, and *John Hinton* and *James* and *Jane Baverstock* surrendered the other moiety to *John Letch* in fee.

6th July, 1778. At a court held this day, *John Letch* was admitted to both moieties in fee.

The execution of the deeds of 29th and 30th May, 1778, 1st and 2d June, 1778, and 24th and 25th June, 1778, was attested by the same witnesses.

*John Hinton* died in 1802, and *Mrs. Jane Baverstock* having survived her husband, died in 1835, intestate. *John Letch*, and the parties under whom the defendant claimed, had been in possession since 1778.

It was contended at the trial for the lessor of the plaintiff, that as by the recovery and subsequent admission of the 16th May, 1778, the property was surrendered to the use of *John Hinton* for life, remainder to the use of *Jane Baver-*

(a) This was also land which the plaintiff laid claim to, but subsequently abandoned.

stock for life, remainder to the use of the heirs of the survivor of them, a contingent remainder was created, which they could not pass by the subsequent surrender to *Letch*; that the contingency having terminated in favour of Mrs. *Baverstock*, in 1802, as the surrender was valid to pass her life estate, on her death, in 1835, the lessor of the plaintiff, who was her son, became entitled to the estate as heir.

It was contended for the defendant, first, that on the whole of the deeds of May and June, 1778, it was clearly not the intention of the parties to create a contingent remainder, but to pass the fee as they had power to do; second, that the uses created on the surrender of May, 1778, were voluntary, and therefore void as against a bona fide purchaser, on the 27 Eliz. c. 4; third, that the lessor of the plaintiff, not having been admitted, could not recover, for that he took as a purchaser, and not as heir; fourth, that the contingency having determined in 1802, the Statute of Limitations applied, as the possession since that time had been adverse.

The learned judge directed the jury to find in favour of the plaintiff, giving the defendant leave to move to enter a nonsuit.

*Spankie Serjt.*, in Easter term, 1836, having obtained a rule nisi for a nonsuit,

*Thesiger, Platt, and C. R. Turner*, shewed cause against this rule, in Michaelmas term last (a). I. As a contingent remainder was created by the uses declared on the surrender of 16th May, 1778, which it is clear could not pass by the subsequent surrender to *Letch*, or by estoppel; *Doe v. Tomkins* (b), *Doe v. Wilson* (c), *Goodtitle v. Morse* (d); it is quite immaterial whether the intention of the parties was to pass a fee or not. If the contingent remainder were created by a mistake of the parties, it is a mistake in law, which

1838.

DOE  
v.  
ROLFE.

First point:  
A contingent remainder in the copyholds being created, the intention of the parties to pass the fee cannot prevail.

(a) Nov. 17 and Nov. 18, before Lord Denman C. J., Patteson, Williams and Coleridge Js.

(b) 11 East, 185.

(c) 4 B. & Ald. 303.

(d) 3 T. R. 365.

1838.

DOE  
v.  
ROLFE.

neither this Court nor Equity can rectify, as full knowledge of the circumstances was had on all sides; *Bilbie v. Lumley* (a), *Brisbane v. Dacres* (b), *Worrall v. Jacob* (c). But there is no evidence on the face of the deeds, that the creation of the contingent remainder was at all contrary to the intention of the parties.

Second point :  
Where a valid consideration may be implied, the Court will not treat a family settlement as void against a purchaser.

II. It is however said, that the uses created by the surrender of 16th May, 1778, are fraudulent against *Letch*, under 27 Eliz. c. 4, as being a voluntary settlement. But that is not so, for on looking at the situation of the parties in May, 1778, a valid consideration for the joinder of all parties in the surrender existed. At that time *John Hinton* was tenant for life as to one moiety of the copyhold premises, with remainder to his daughter *Jane Baverstock* in tail, with remainder to his own heirs, and *Mrs. Baverstock* was tenant in fee of the other moiety by descent. As the object of the parties was to suffer a recovery, in order to bar the estates tail, the concurrence of *John Hinton* was necessary; and as on the surrender he was to take an estate in fee, contingent on the event of his surviving his daughter, *Mrs. Baverstock*, these two facts formed a good consideration for the surrender of each party respectively. By the marriage articles also, of October, 1769, *John Hinton* had covenanted to settle a moiety of the copyholds on *Mrs. Baverstock*, and the surrender of May 16, 1778, states that *John Hinton* did then, in pursuance of his covenant, surrender the said moiety to the trustees of his daughter. The recovery, therefore, was suffered for the purpose of carrying into effect the antenuptial articles of October, 1769, and a settlement was accordingly made in 1778. Settlements of this nature, the Courts are always astute to support, and the cases shew that *John Hinton* had sufficient consideration for joining in the conveyance. Thus in *Scot v. Bell* (d), where a married

(a) 2 East, 469.

(b) 5 Taunt. 143.

(c) 3 Mer. 255.

(d) 2 Lev. 70.

woman joined in a fine to destroy the settlement made on her before marriage, and on the same day another settlement was made upon her, by which she took lands of much greater value, it was held that the Court would intend that she only consented to bar her old settlement on the consideration of a new settlement being made upon her, and therefore that the conveyance was not voluntary, and void against a purchaser. So in *Myddleton v. Lord Kenyon* (a), it was held that the joinder of the son with his father to charge the settled estates was a valid consideration. *Osgood v. Strode* (b) completely illustrates the position, that where the concurrence of a party is necessary in a settlement, good consideration may be presumed from the fact of his joining in the deed. There, the father and the son had each an interest in the estate, and by articles prior to the son's marriage, they covenanted to settle the lands on the son for life, remainder to the wife for life, remainder to the issue male of the marriage, remainder to the nephew of the father in fee; and on its being contended that there was no consideration to support the limitation to the nephew, who was a stranger to the marriage, Lord *Macclesfield* C. held that he would presume a stipulation by the father that the estate should be so limited, before he would join in the settlement. *Roe v. Mitton* (c) is a still stronger case. There the mother having a settlement upon the whole of her son *John Hamerton's* lands, on his marriage consented to part with her security on the whole, and to take instead a security on part of the lands; and in the marriage settlement thereupon drawn up, the lands were settled to the use of the son for life, remainder to his sons in tail male successively, remainder to his brother *Thomas Hamerton* in tail male, remainder to the daughters of *John Hamerton* in tail, remainder to *John Hamerton* in fee. It was objected that there was no consideration to support the limitation to the brother, but the

1838.

DOE  
v.

ROLFE.

(a) 2 Ves. jun. 410.

*Myddleton v. Lord Kenyon*, 2 Ves. jun.  
410.

(b) 2 P. Wms. 245.

(c) 2 Wils. 356. Cited in *Myd-*

1838.

*Doe*  
v.  
*Robt.*

Court held, that the mother must be presumed to have joined in the settlement only on the consideration of the estate being limited to her second son *Thomas*, on the failure in tail male of the issue of her son *John*. *Hill v. Bishop of Exeter* (a) is also a distinct authority, that the giving up any right is a valuable consideration to support a conveyance, and that a pecuniary consideration is not required. *Nunn v. Wilmore* (b) is also an authority to shew the tendency of the Courts to presume a good consideration for a family settlement. In this case, therefore, the Court will presume that *John Hinton* agreed to give up his estate for life, for the chance of getting the estate to himself in fee.

Third point.

III. With regard to the non-admission of the lessor of the plaintiff, it is clearly not necessary, as he was the remainderman, and therefore the admittance of the tenant for life was sufficient; *Phypers v. Eburn* (c). [*Spankie* Serjt. intimated that it was not intended to rely upon this point.]

Fourth point.

IV. As to the point of the Statute of Limitations, viz. that the contingency having determined in *Mrs. Baverstock's* favour, in 1802, her right of entry accrued then, it is concluded by *Doe v. Wilson* (d).

Second point.

*Spankie* Serjt., *Channell*, and *Tomlinson*, contra.—The general proposition is not disputed, that a settlement made in consideration of marriage, is not to be considered as voluntary; but even then the limitations can only be upheld with regard to the husband, wife, and issue, and are void as to remainders to collateral relations on a subsequent sale to a bonâ fide purchaser; *Johnson v. Legard* (e), *Clayton v. Wilton* (f). The cases may even be thought to have gone

(a) 2 Taunt. 69.

(b) 8 T. R. 521.

(c) 3 Bing. N. C. 250. See also *Church v. Mundy*, 12 Ves. jun. 426.

(d) 4 B. & Ald. 303.

(e) 6 M. & S. 60. This case

was reversed by the Lord Chancellor on the circumstances of the case, but not as to the principle in the text, 1 Turn. & Russ. 281.

(f) 6 M. & S. 672; 2 Sugd. V. & P. 164, 9th. ed.

too far on the 27 *Eliz.* c. 4 (a), but they all concur in shewing that a purchaser is not to be affected by a conveyance, however proper, and otherwise unobjectionable, if made without valid consideration; *Humberton v. Howgil* (b), *Pulvertoft v. Pulvertoft* (c), *Buckle v. Mitchell* (d), *Goodright v. Mores* (e). The cases in which a good consideration has been held to exist to take conveyances with limitations, extending beyond the marriage, out of the statute of *Elizabeth*, may be divided into three classes:—1st, where the consideration is money only, or something equivalent to money; 2nd, where marriage is the consideration, but not the whole; 3rd, where the concurrence of parties has been requisite, but marriage is not a part of the consideration. Under the first class fall the cases of *Nunn v. Wilmore* (f), where a sum of money was the consideration, and *Hill v. The Bishop of Exeter* (g), where a legal right was relinquished, which, as was observed by the Court, the other party might have reasonably given money for. In the second class of cases, a marriage forms part of the consideration, but other circumstances are found to concur. *Roe v. Mitton* (h) is an instance of this. The marriage alone there would not have been a sufficient consideration for the limitation to the nephew; but *Wilmot C. J.* held, that the mother must be presumed to have given her consent to make the alteration in her jointure, only upon the condition of the estate being limited to her younger sons in preference to the daughters of the marriage of her elder son. In *Pulvertoft v. Pulvertoft* (c), where marriage only

1838.

DOE  
v.  
ROLFE.

(a) See the elaborate judgment of Lord Ellenborough C. J. in *Doe v. Manning*, 9 East, 59, where the cases are reviewed, and the construction of 27 *Eliz.* c. 4, is pointed out, that a voluntary conveyance is fraudulent within the terms of the statute, and void against a purchaser even with notice. See also

Mr. *Atherley's* note (m) in his edition of Shep. Touch. 63, 8th ed.

(b) Hob. 72.

(c) 18 Ves. 84.

(d) 18 Ves. 100.

(e) 2 W. Bl. 1019.

(f) 8 T. R. 521.

(g) 2 Taunt. 69.

(h) 2 Wils. 366.

1838.

DOE

v.

ROLFE.

was the consideration, the settlement, which was made after the marriage, was held to be voluntary. In the third class of cases, marriage does not form part of the consideration; but the consent of the party being necessary, the Courts have held that it would imply a consideration. Thus, in *Scot v. Bell* (a), where the wife gave up her settlement, the Court held, that it was on the condition that she was to have a new settlement. The case of *Osgood v. Strode* (b) would also fall within this class, but it is not a decision in which a bonâ fide purchaser is concerned at all. It is to be observed, however, that the consideration which the Court has presumed in all these cases is a reasonable one, and one which, no doubt, existed in all the cases impliedly at least, if not in terms. The argument for the lessor of the plaintiff would bring his case within the second class, where marriage formed the consideration, but not the whole. But what an improbable contract the Court is called upon to presume? That *John Hinton* having an estate for life, remainder in tail to his daughter *Jane*, should give up his life estate for the chance of getting an estate in fee, in the event of his surviving his daughter; and that his daughter *Jane* and her husband, having five children living at the time, should give up their estate tail to the father in fee, by which they might deprive their own children of the estate. No trace of such contract appears on the deeds, and it is quite clear that no such improvident bargain ever could have been contemplated. The object of the parties to all these deeds of 1778, is quite evident. *John Hinton*, and *James* and *Jane Baverstock*, suffered a recovery in May, 1778, for the very purpose of barring estates tail, and of making a settlement in pursuance of the covenants of *John Hinton*, in 1769, and of *Martha Hinton's* covenant in 1746, and also for carrying into effect the agreement with *John Letch* for the sale of the copyhold property, as appears by the deeds of June, 1778. The creation of the contingent remainder, which defeated the manifest object they had, viz. to alienate, could not

(a) 2 Lev. 70.

(b) 2 P. Wms. 245.

therefore have proceeded from any fixed plan or contract, but was a mere blunder. No other consideration appears on the surrender, creating the contingent remainder; the whole conveyance, therefore, is void against a bona fide purchaser. The several deeds of May and June, 1778, which were all within a few days of another, and were attested by the same witnesses, must be looked at together, as they all form one assurance; *Doe v. Whitehead* (a), *Selwyn v. Selwyn* (b), *Roe v. Griffiths* (c). On inspection of these deeds, the nature of the transaction evidently appears, viz. that the recovery of the 16th of May, 1778, was suffered, in order to enable the parties to alienate, and that an agreement had been made by the trustees to sell part of the settled lands to *Letch*, in order to purchase others of greater value at Alton.

1838.  
  
 Doe  
 v.  
 Rolfe.

*Cur. adv. vult.*

The COURT, on a subsequent day, pointed out to the counsel in the cause, that if the recovery and the uses declared upon it were void as a voluntary conveyance, the estate tail of *Jane Baverstock* would then be in existence, and would prevent the conveyance of a good title to *Letch*; and they desired to hear a further argument upon the point, whether, on the uses being declared to be void, the recovery could stand. The case came on for argument in Easter term last (d).

*C. R. Turner*, for the lessor of the plaintiff.—If the uses of the surrender of May, 1776, be void as a voluntary limitation, the recovery which was suffered is also void, for the recovery and the surrender to uses is all one transaction: this was distinctly stated by *Gould J.* in *Stevens v. Winning* (e), with respect to a fine and the deed to lead its uses. That being so, the lessor of the plaintiff is entitled to recover, for the

Fifth point :  
 Where the uses declared on a recovery are void against a purchaser, the recovery is void also.

(a) 2 Burr. 710.

(b) 2 Burr. 1131.

(c) 4 Burr. 1952.

(d) May 4, before Lord Den-

man C. J., *Patteson* and *Coleridge* Js.

(e) 2 Wils. 219.

1838.

Dox

v.

ROLYE.

estate tail of his mother not having been barred, he comes in, in the estate tail. In *Fitzjames v. Moys* (a), the Court held, that a deed to lead the uses of a recovery suffered by the tenant in tail was void, but they did not declare any new uses upon it. If it is contended that, if a use results from the recovery suffered, different from that declared by the parties, recourse must be had to a Court of Equity.

Fifth point.

*Spankie Serjt.*, contra.—Admitting that the recovery and surrender to uses form one conveyance, the illegality of the uses does not avoid the recovery. Numerous cases shew that, where a deed contains legal and illegal covenants, the law will distinguish between the two, and support that part of the deed which is legal, *Shepp. Touch.* 70, 8th ed.; *Pigot's case* (b). In *Winchcombe v. The Bishop of Winchester* (c), where *Hobart C. J.* was giving instances in support of this proposition, he cited as the commonest cases "those where the same thing may be void as to one person, and not void as to another, and that commonly runs upon this distinction, though it be made void against some person and for some purpose, yet it is ever good against the party himself that made it (d), as are the cases of fraudulent conveyances and alienations of women tenants in dower or jointresses, as upon the statute of 11 Hen. 7 (e)." There are many other cases to the same effect, *Greenwood v. The Bishop of Exeter* (f), *Dox v. Pitcher* (g). In *Fitzjames v. Moys* (a), no question was made that the recovery was void *in toto*. The recovery then being good, although the uses are void, the uses result in law to those who suffer the recovery; per *Lee C. J.* in *Martin v. Strachan* (h). 1 Inst. 23 a; *Gilbert's Uses*, by Sugd. 119; *Com. Dig. Uses*, (D. 2); 1 Prest. Conv. 194. Mr. *Preston* states, that on

(a) 1 Sid. 133.

(b) 11 Rep. 26 b.

(c) Hob. 165.

(d) See as to this, *Smith v. Garland*, 2 Mer. 123; *Johnson v. Le-gard*, 3 Madd. 283; and the cases collected in Mr. *Thomas's* note (r)to *Twyner's* case, 3 Rep. 89 b.(e) Citing Bro. Abr. Entre-  
congeable, 14.

(f) 6 Taunt. 727.

(g) 6 Taunt. 359.

(h) 5 T. R. 107, n.

a recovery' suffered by a tenant in tail he takes back an estate in fee by resulting use; and, he cites an opinion of Mr. *Fearne* that, where the recovery is suffered by the tenant in tail with the concurrence of the preceding tenant for life, the fee vests in the tenant in tail, subject to the use resulting to the tenant for life. Where the uses are void, it is like declaring an impossible use, in which case the recovery enures to the benefit of the person suffering it; Vin. Abr. Uses, (E a) pl. 4; (Y a) 3. These authorities shew that *John Hinton* and Mrs. *Baverstock* acquired the fee by the recovery they suffered, and therefore they were enabled to convey the legal estate to *John Letch* (a). That being the case, the Court will follow the course of decisions from the earliest times, *Burrell's case* (b), in giving effect to the 27. Eliz. c. 4, in favour of a bona fide purchaser.

1838.

DOE  
v.  
ROUSE.

*Cur. adv. vult.*

LORD DENMAN C. J. on this day delivered the judgment of the Court:—This was an ejectment to recover certain copyhold premises in the county of Essex. The lessor of the plaintiff claimed as heir at law of Mrs. *Jane Baverstock*. The defendant held under *John Letch*, who had purchased the premises many years ago. A verdict was found for the lessor of the plaintiff, with liberty to move to enter a nonsuit. A rule nisi to that effect having been obtained, the case was argued in Michaelmas term last, when the facts appeared to be as follows:—On the 29th June, 1732, *Mary Hinton*, the wife of *Edward Hinton*, was admitted to a moiety of the premises in fee, as co-heiress of her father, *François Bridge*, which moiety, and on the same day, she and

(a) See *Hore v. Dix*, 1 Sid. 25, pl. 7, in which the uses declared by a deed of feoffment were held to be void; but it was resolved that if the deed had been valid (which it was not for want of livery of

seisin,) the uses would have resulted for another purpose.

(b) 6 Rep. 72 a. See the cases collected in *Twynes' case*, 3 Rep. 212, ed. of *Thomas and Farquar*.

1838.

Doe

v.

ROLFE.

her husband surrendered to the use of *Mary Hinton* for life; remainder to the use of *Edward Hinton* for life; remainder to the use of the heirs of the body of *Mary Hinton* by *Edward Hinton*; remainder to the use of the right heirs of *Mary Hinton*. On the 19th May, 1746, *Martha Hinton*, the only child of *Edward* and *Mary* (they being both dead) was admitted to this moiety as tenant in tail. On 1st August, 1746, *Martha Hinton* surrendered, in order that a recovery might be suffered, which was done, and the moiety afterwards surrendered and settled to the use of *Martha Hinton* for life; remainder to the use of her intended husband, *John Hinton*, for life; remainder to the use of the children of the marriage, according to appointment; remainder to the use of the heirs of the body of *Martha Hinton* by *John Hinton*; remainder to the use of the right heirs of the survivor of *John* and *Martha Hinton*, in fee. On the 4th June, 1762, *John Hinton* was admitted tenant for life, on the death of his wife. On the 16th May, 1778, *Jane Baverstock*, the wife of *James Baverstock*, and the only surviving child of *John* and *Martha Hinton*, (her sister *Martha* having died an infant unmarried,) was admitted tenant in tail in remainder. This moiety then stood settled to *John Hinton* for life; remainder to *Jane Baverstock* in tail; remainder to *John Hinton* in fee, for the contingency of survivorship between him and his wife had happened in his favour. The other moiety, on the death of *Mrs. Sarah Betts* (who was the sister of *Mary Hinton*, and co-heiress of *Francis Bridge*,) and her husband, descended to *Martha Hinton*, who was admitted in fee 19th May, 1758. She, by her marriage settlement in 1746, covenanted to settle this moiety in the same way as the other was settled, but died without doing so. After her death, on 4th June, 1762, her daughters, *Jane* and *Martha*, were admitted each to a fourth in fee. On 7th July, 1777, on the death of *Martha*, *Jane Baverstock*, her sister, was admitted to her share. On 16th May, 1778, *Jane Baverstock*, in pursuance of the covenant in her mother's settlement,

1838.

DOR  
v.

ROLFE.

surrendered the whole moiety to the use of her father, *John Hinton*, for life; remainder to the use of her, *Jane Baverstock*, in tail; remainder to the use of the heirs of *John Hinton* for ever; whereby this moiety, as well as the other, became settled in *John Hinton* for life; remainder to *Jane Baverstock* in tail; remainder to *John Hinton* in fee. On the same day, *John Hinton* and *Jane Baverstock* surrendered the entirety for the purpose of suffering a recovery, which was accordingly suffered, and the premises surrendered to the use of *John Hinton* for life; remainder to *Jane Baverstock* for life; remainder to the heirs of the survivor. On the same day *John Hinton*, in performance of his covenant in his daughter's marriage settlement, dated October 9th, 1769, and *James Baverstock* and *Jane* his wife, surrendered a moiety of the premises to the use of the trustees of that settlement, *Charles Blackstone* and *Thomas Baverstock*, their heirs and assigns, in trust for *James Baverstock* for life; remainder to *Jane Baverstock* for life; remainder to *Thomas Baverstock*, their eldest child, and four others by name, as *James* and *Jane* should appoint; and in default of appointment, to *Thomas*, the eldest, in tail; remainder to *James* the second in tail; remainder to the third and fourth and other sons; remainder to the daughters in tail; remainder to the heirs of *Jane Baverstock* for ever, with a power to the trustees, at the request of *James* and *Jane*, to sell the moiety and invest the proceeds in other estates to be settled to the same uses, and with a power to *John Hinton*, *James Baverstock*, and the trustees unanimously, to alter or make void all the uses, and to create new and other uses. On the 6th July, 1778, *John Hinton*, *James Baverstock*, and *Jane* his wife, surrendered one moiety to *John Letch* in fee. And the trustees, at the special instance and request of *James Baverstock* and *Jane* his wife, testified by their joining in the surrender, surrendered the other moiety to *John Letch* in fee. This was a bonâ fide purchase by *John Letch* for an adequate consideration, and the possession has gone along with

1838.



DOE  
v.  
ROLFE.

First point.

it ever since. *John Hinton*, the father of *Mrs. Baverstock*, died in 1802. *Jane Baverstock* died in 1835. It was contended by the defendant, First, That the lessor of the plaintiff had never been admitted; but this point was given up on the argument, it being clear that he claimed as heir. Secondly, That the Statute of Limitations applies; but it is plain that *Mrs. Baverstock's* life interest, at all events, passed to the defendant, she, therefore, could never enter, and the lessor of the plaintiff had no right of entry till her death. Thirdly, That the contingent remainder created by the settlement of 16 May, 1778, was void as against a bonâ fide purchaser, being a voluntary conveyance. It seems most probable, that the parties in the surrender to *Letch* acted under a mistaken supposition that the contingent remainder would pass to him. The cases, however, of *Doe v. Tomkins* (a), and *Doe v. Wilson* (b), shew that it would not; but even if such a mistake was made, the Court has no power to remedy it; and inasmuch as *Mrs. Baverstock* did not, after the fee had vested in her by survivorship, on the death of her father, make any further surrender of the premises, it seems clear that, if the uses of that surrender to *Mr. Hinton* for life, remainder to *Mrs. Baverstock* for life, remainder to the heirs of the survivor, are held valid, the lessor of the plaintiff must be entitled to recover. On the other hand, if those uses, and the recovery under which they are declared, be held void under the statute 27 Eliz.c. 4, as against a purchaser, then the surrender to *Letch* must be treated as made by tenant for life, tenant in tail in remainder, and tenant in fee in remainder. Neither that surrender nor any subsequent one barred the estate tail of *Mrs. Baverstock*, therefore *Letch* took only for the lives of *Mr. Hinton* and *Mrs. Baverstock*, and the lessor of the plaintiff, as issue in tail, is entitled to recover. If this view of the case be correct, the only mode by which the defendant can succeed is, by satisfying the Court that the reco-

Second point.

recover. On the other hand, if those uses, and the recovery under which they are declared, be held void under the statute 27 Eliz.c. 4, as against a purchaser, then the surrender to *Letch* must be treated as made by tenant for life, tenant in tail in remainder, and tenant in fee in remainder. Neither that surrender nor any subsequent one barred the estate tail of *Mrs. Baverstock*, therefore *Letch* took only for the lives of *Mr. Hinton* and *Mrs. Baverstock*, and the lessor of the plaintiff, as issue in tail, is entitled to recover. If this view of the case be correct, the only mode by which the defendant can succeed is, by satisfying the Court that the reco-

(a) 11 East, 185.

(b) 4 B. &amp; A. 303.

very suffered by Mr. *Hinton* and Mrs. *Baverstock* is valid, so as to bar her estate tail, though the uses declared upon it are void as a voluntary settlement; in which case an use would result to Mrs. *Baverstock* in fee, as for want of any declaration of uses, those declarations being held void. The Court had some doubt as to this last point, and in consequence directed a second argument, upon which we are satisfied, on reference to the cases cited, particularly that of *Fitzjames v. Moys* (a), that such use would result (b). The single question therefore is, whether the contingent remainder be void under statute 27 *Eliz.* c. 4. Many cases were cited upon the argument, most of which will be found collected in the case of *Johnson v. Legard* (c). On the one hand it is said that, as the limitations of the estate could not be changed without the consent of all parties, the joining of those parties, namely, Mr. *Hinton* and Mrs. *Baverstock*, is itself a sufficient consideration to prevent the new settlement from being voluntary. On the other hand it is argued, that such joinder is not in itself sufficient, unless the terms of joining be matter of contract and bargain, and for this point *Goodright v. Moses* (d) was cited; also 18 *Ves.* 92, *Pulvertoft v. Pulvertoft*; and in the same volume, 100, *Buckle v. Mitchell*. It is further argued, that no contract appears in this case, either upon the face of the documents or in any other manner, nor is any valuable consideration necessarily implied from the circumstances; and that the plain object of the parties was to effectuate a valid sale of the premises. It is difficult to reconcile all the cases upon this subject, or rather to extract from them any clear principle for our guidance. The inclination of the Courts appears to have been always to support a fair settlement in favour of the persons intended to be benefited by that

1833.

DOE  
v.  
ROLFE.

(a) 1 *Siderfin*, 139.

(b) See also *Moore*, 197, pl. 347; 22 *Vin. Abr.* 293, pl. 6. If husband and wife, on suffering a recovery of lands, of the wife, make separate declarations of uses,

VOL. III.

both of them are void, and the use results to the wife and her heirs. See also *Beckwith's case*, 2 *Rep.* 56 b. 58 a.

(c) 6 *M. & S.* 60.(d) 2 *Bl.* 1019.

1838.

DoE  
v.  
ROLFE.

settlement, and to treat nearly any consideration as sufficient for that purpose. That inclination, however, cannot operate on the present occasion, inasmuch as the lessor of the plaintiff is clearly not one of the persons intended to be benefited. Upon the whole, we are of opinion that the uses declared upon the recovery in question were voluntary and void within the statute of *Eliz.*, as against purchasers, no sufficient consideration having been shewn to us, and the more so as we cannot but see that the plain intention, both of Mr. *Hinton* and Mrs. *Baverstock*, was, to sell the premises, and that the different surrenders were made under the supposition of their being necessary in order effectually to make that sale. The rule for a nonsuit must therefore be made absolute.

Rule absolute.

Thursday,  
June 14th.

SEWERCROP v. DAY and others.

1. Where administration with the will annexed is granted to a person as the attorney of and for the benefit of the executor, such person represents the testator during the life of the executor, or until he take out probate.

2. Plaintiff declared as administrator with the will annexed of *F.*, of the goods left unadministered by *K.*, the executor, who was alleged to have proved the will by his attorney, to whom administration with the will annexed was granted for the benefit of *K.*, which *K.*, since deceased, left *H.* his executor, whereupon administration with the will of *F.* annexed was granted to the plaintiff, for the benefit of *H.*; and stated in the first count, that defendants were indebted to *K.*, as executor as aforesaid, for interest of money forborne by him as such executor, and promised him as such executor; and in the second count, that defendants were indebted to the plaintiff as such administrator for interest, &c., and promised him as such administrator:—Held, that the first count was bad in arrest of judgment, as *K.* never was executor, and the promise of the defendants was in law to his attorney, to whom administration was granted; but that this grant was ipso facto at an end on the death of *K.*, and consequently the subsequent grant to the plaintiff good, who was entitled to recover, under the second count, such interest only as accrued after the grant to him.

*behalf*, to whom the said Court granted letters of administration with the will of *Fox* annexed (*for the benefit of the said Kernan*), which said *Kernan*, now deceased, by his last will appointed *J. Macdowell* and *J. H. Hewlings* executors thereof; which said *Macdowell* has since departed this life; whereupon, upon the petition of the plaintiff, administration with the will annexed of the said *Fox* was granted to the plaintiff *for the benefit of Hewlings*, until he should legally apply for and obtain probate of the will of *Kernan*, deceased, (which said *Kernan* in his life-time was the executor of the said *Fox*, and duly proved the said will of the said *Fox* as aforesaid,) complained of the defendants; for that whereas the defendants, after the death of the said *Fox*, and in the life-time of the said *Kernan*, to wit, on the 10th day of August, 1831, were indebted to the said *Kernan* as executor as aforesaid in 500*l.*, for interest, for the forbearance by the said *Kernan* as executor as aforesaid to the defendants, and at their request, of monies owing from the defendants to the said *Kernan* as executor as aforesaid, and had promised &c. the said *Kernan* to pay him the said sum of money on request: yet the defendants had disregarded their promises &c., and had not paid the said sum to the said *Kernan* in his life-time, or the plaintiff, administrator as aforesaid, since the death of the said *Kernan*. Second count, that the defendants, on the 10th day of March, 1834, were indebted to the plaintiff, as administrator as aforesaid, in 500*l.* for interest, for the forbearance by the plaintiff as administrator as aforesaid, at the defendants' request, of monies owing from the defendants to the plaintiff as administrator as aforesaid, and in 500*l.* for money found to be due from the defendants to the plaintiff as administrator as aforesaid, on an account stated between them, alleging a promise to the plaintiff as administrator as aforesaid.

Profert of grant of administration to the said *Allan Macdonald*, the attorney of the said *Kernan*, with the will of the said *Fox* annexed, as also of the letters of adminis-

1838.  
  
 SEWERCROP  
 v.  
 DAY  
 and others.

1838.  
 SEWERCROP  
 v.  
 DAY  
 and others.

tration, after the death of the said *Kernan*, to plaintiff as aforesaid.

Pleas to the first count:—1. That *Kernan* did not prove the will of *Fox*, but on the contrary thereof, that after the death of *Fox*, to wit, on the 27th December, 1830, administration with the will annexed of the effects of *Fox* was granted to *Macdonald*, and that thereby *Macdonald* became the representative of *Fox*, and so remained until and at the time of the death of *Kernan*, absque hoc, that the defendants were indebted to *Kernan* as executor as aforesaid, in manner and form &c. 2. That defendants did not promise *Kernan* as executor as aforesaid, in manner and form, &c. To the second count, that they did not promise the plaintiff as administrator as aforesaid. Issue on those pleas.

At the trial before Lord *Denman* C. J., at Guildhall, at the sittings after Michaelmas term, 1836, the following facts appeared. In May, 1830, *Fox* died in the West Indies, leaving *Kernan*, who was also out of this country, his executor. *Kernan* did not prove the will personally, but in December, 1830, administration with the will annexed was granted, in the Prerogative Court, to *Macdonald* for the benefit of *Kernan*. In August, 1831, *Kernan* died, leaving *Macdowell* and *Hewlings* his executors. *Macdowell* afterwards died, and on the 28th November, 1833, administration with the will annexed of *Fox*, was granted to the plaintiff, until *Hewlings* should prove the will. At the time of *Fox's* death the defendants were indebted to him in a principal sum, on which interest was payable. In August, 1831, they paid off part of the principal by honouring a draft drawn by *Kernan* as executor, to whom also, in the same capacity, they by letter admitted their liability for the balance. In December, 1833, the balance of principal was paid to the plaintiff, but the interest was not paid. On the 11th August, 1831, when *Kernan* died, about 125*l.* was due for interest, which was claimed on the first count; and in December, 1833, a further sum of 204*l.*

had become due, which was claimed on the other count. It was objected, that as *Kernan* had not proved the will, he was not executor, so as to sustain the first count for forbearance by him; and that as the administration to *Macdonald*, who was still living, had not been revoked, he was the legal representative of *Fox*, and not the plaintiff, so that the second count in the declaration could not be sustained; and that even if it were not necessary, that the administration to *Macdonald* should be revoked, the plaintiff could only recover for so much interest as had accrued since the administration granted to himself. A verdict was taken for the plaintiff for the entire claim, with leave to move to enter a verdict for the defendants, or to reduce the damages on the second count.

In the following Hilary term Sir *J. Campbell* A. G. obtained a rule nisi to enter a verdict for the defendants, to arrest the judgment, or to reduce the damages.

*Platt* and *Petersdorff*, on a former day in this term(a), shewed cause. It is stated that the action cannot be maintained, because the forbearance to the defendants has been given by *Macdonald*, to whom the letters of administration were granted, and not by either *Kernan* or *Sewercrop*. *Macdonald*, however, has no right of action, for administration was granted to him as *Kernan's* attorney; on the death, therefore, of his principal, his functions were at an end. Thus, where an executor is abroad, and administration is granted, durante absentia, to his attorney, the administration granted to the attorney at once determines on the return of the executor to this country, and no revocation is necessary; *In the goods of Cassidy*(b). *Taynton v. Hannay*(c) does not militate against this doctrine, as it was a case under the 38 Geo. 3, c. 87, which applies only where the executor has gone abroad after probate granted.

1838.  
SEWERCROP  
v.  
DAY  
and others.

(a) Friday, June 8th, before  
Lord Denman C. J., Littledale,  
Patteson and Williams Js.

(b) 4 Hag. 360.

(c) 3 Bos. & Pul. 26.

1838.  
 SEWERCROFT  
 v.  
 DAY  
 and others.

Therefore both counts in the declaration were sustained at the trial; the proof of interest due for forbearance during *Kernan's* life supports the first count, for he had a right to forbear, or even to release a debt, without taking out probate; and the proof of interest due for forbearance since *Kernan's* death, supports the second count. There is no objection to laying the promise in the first count to have been made to *Kernan*; *Hirst v. Smith(a)*; and the action for the whole interest is properly brought by the plaintiff as administrator de bonis non of *Fox*; *Catherwood v. Chabaud(b)*.

Sir *J. Campbell A.G.*, contra. No doubt an executor may do many things before proving the will, which are made valid by a subsequent grant of probate; but if he die without ever having any probate at all, he never for a moment represented his testator. *Kernan* never had probate granted to him; he therefore did not represent the testator, and had no power to appoint *Hewlings* to represent him. If the attorney to whom administration is granted, and not his principal, represent the testator, then *Kernan* never was representative; if, however, the principal represent him and not the attorney, then *Hewlings* is the present representative and not the plaintiff. It is conceived, however, that in all such cases the attorney is the real representative, that he continues so until his administration is revoked, and that *Macdonald* is the representative of *Fox* at this moment. The first count alleges a promise to *Kernan*, and the issue upon that count is, whether or not he proved the will of *Fox*; on this issue the defendants clearly succeeded, for the letter in which *Kernan* is treated as executor cannot vary the rights of the parties. The plea to the second count denies the promise to the plaintiff, which raises the question whether the administration to *Macdonald* has ceased. *Taynton v. Hannay(c)*, is an authority

(a) 7 T. R. 182.

(c) 3 Bos. & Pal. 26.

(b) 1 B. & C. 150; S. C. 2 D. & R. 271.

that his administration is still in force; for although it is a decision on the 38 *Geo. 3*, c. 87, yet administration under that statute is granted in much the same language as in the present case. The objection to the first count is apparent on the record, the defendants therefore are entitled to have the judgment arrested on that count, and no evidence was given in support of the second count. But even if the plaintiff be entitled to so much interest as may have accrued since administration granted to him, the rule for reducing the damages to that amount must be made absolute.

1838.  
  
 SEWERCROP  
 v.  
 DAY  
 and others.

*Cur. adv. vult.*

LORD DENMAN C.J. on this day delivered the judgment of the Court.—This was an action by the plaintiff, describing himself as administrator with the will annexed of *Fox*, of the goods left unadministered by *Kernan*, who was executor of *Fox*, and was alleged to have proved the will by *Macdonald* his attorney, to whom, as such attorney, administration with the will for the benefit of *Kernan* was granted, which said *Kernan* is since deceased, having left one *Hewlings* his executor, and on his death the plaintiff took out administration with the will of *Fox* annexed, for the benefit of *Hewlings*. The first count states that the defendants were indebted to *Kernan* as executor as aforesaid, for interest of money forborne by him as such executor, and lays the promise to *Kernan* as such executor. The second count states that the defendants were indebted to the plaintiff as such administrator for interest of money forborne by him as such administrator, and lays the promise to the plaintiff as such administrator. Profert is made of the letters of administration both to *Macdonald* and to the plaintiff. The first plea traverses the being indebted to *Kernan* as such executor. The second traverses the promise to *Kernan*. The third traverses the promise to the plaintiff. The question in the cause is, what is the legal effect of these different letters of administration.

We are of opinion that by the first grant *Macdonald* be-

1838.  
  
 SEWERCROP  
 v.  
 DAY  
 and others.

came the legal representative of *Fox* during the life of *Kernan*, and at all events until he should himself take out probate, which he never did, but that on the death of *Kernan* that grant was, ipso facto, at an end, and the subsequent grant to the plaintiff is good. The consequence is, that the plaintiff is entitled to recover on the second count all interest accruing subsequent to the grant to him, and the rule must be absolute to reduce the verdict on that count to that amount. But the defendants are entitled to a verdict on both the issues on the first count, because the defendants never were indebted to *Kernan*, as executor, for interest, nor promised him as executor. Their debt and their promise in law for interest during *Kernan's* life was to *Macdonald* as administrator, and not to *Kernan*. This appears on the face of the declaration itself, and therefore would be a ground for arresting judgment on the first count; but as we are of opinion that the issues on that count are proved in favour of the defendant, the rule will be absolute to enter the verdict accordingly.

Rule absolute to enter verdict for defendants  
 on the first count, and to reduce the da-  
 mages on the second count.

ABERCROMBIE and others v. HICKMAN, Executor of  
 POCOCK, deceased.

Thursday,  
 June 14th.

1. Under the  
 Insolvent Act,  
 1 Geo. 4, c.  
 119, s. 14 (un-  
 repealed as to  
 assignments  
 made in pur-  
 suance of it), if the commissioners, on the death of an insolvent's assignee, do not ap-  
 point another, the insolvent's estate vests in the executor of the deceased assignee.

2. In covenant for rent and non-repair, the husband of a person to whose separate use, with remainder to their children, an annuity charged upon the premises in question is settled, is a competent witness for the plaintiff.

**COVENANT.** The declaration alleged, that one *Wil-*  
*mot*, by indenture, dated in April, 1804, demised certain  
 premises to one *Tasker*, for a term of 41 years, and set out  
 the usual covenants for payment of rent and keeping in

repair; that the plaintiffs became possessed of the reversion; that afterwards, to wit, in 1822, *Tasker's* interest came by assignment to one *Pocock*, and that on his death it vested in defendant as his executor. It then charged the defendant, as executor of *Pocock*, and as assignee, after he had become such executor and assignee, with a breach of the above covenants.

Pleas: 1. That *Pocock*, in his life-time, never was assignee. 2. That defendant never was assignee. 3. That the demised premises did not come to or vest in the defendant as executor. Issue was joined on those pleas.

At the trial before *Patteson J.*, at the Middlesex sittings in Hilary term, 1837, the lease to *Tasker* and the title of the plaintiffs were admitted. The following facts were also admitted:—In 1822 *Tasker* was discharged under the Insolvent Debtors' Act, when *Pocock* signified his acceptance of the office of assignee, by filling up in his own hand-writing a printed blank form, which is filed in the Insolvent Debtors' Court Office. The provisional assignee then executed two parts of an assignment of the insolvent's estate to *Pocock*, dated November, 1822, but both parts had remained ever since in the Insolvent Debtors' Court Office, neither of them having been executed by *Pocock*. *Pocock* died in 1832. The defendant was appointed sole executor, and proved the will in 1833, since which time arrears for rent had accrued and dilapidations had occurred to an amount agreed on between the parties. The plaintiffs were trustees under the will of *Wilmot*, who had devised to them the premises in question and other property, charged with certain annuities to his daughters. To prove that *Pocock* had assented to take the term, and had acted in respect of it, by letting the premises and receiving the rent for them, a witness was called (the husband of one of *Wilmot's* daughters), who was entitled to one of the said annuities to her separate use. This witness was objected to as incompetent, on the ground that he had an interest in the success of the action, as the money to be recovered

1838.

ABERCROMBIE  
v.

HICKMAN.

1838.  
  
 ABERCROMBIE  
 v.  
 HICKMAN.

would go towards the payment of the annuities, and also to the reparation of the premises, whereby the security for the annuities would be improved. It was also objected that *Pocock*, not having executed the deed of assignment, never had been assignee, and that, even if he had been, his interest involving a personal trust under the Insolvent Debtors' Act, did not pass to the defendant as his executor. The learned judge overruled both objections, and directed the jury to find for the plaintiff, if they believed that *Pocock* had assented to the assignment. Verdict for the plaintiff, with leave to move to enter a nonsuit.

*Platt* having in the same term obtained a rule nisi,

*Channell*, on a former day in this term, shewed cause (a).

1. The witness was competent, even if considered as himself the annuitant. It will be objected that the rent recovered in this action will increase the fund from which the annuity is payable, and that the sum given for dilapidations will improve the security on which that annuity is charged. But this is very different from the case of a residuary legatee, whose portion is to be increased by the verdict. The witness, in right of his wife, is entitled to a *fixed* sum. In an action against executors to recover a debt owing by the testator, an annuitant under his will is a competent witness for them; *Nowell v. Davies* (b). In this case certainly the witness was not called to shew that no debt was due; but the principle is the same: there the effect of the annuitant's evidence was to prevent diminution of the fund out of which the annuity was payable; and here the effect is to increase that fund. 2. Then it is said that this term never vested in *Pocock*, and that, even if it did so vest, it came to him as a personal trust in his character of assignee, so that it could not pass to his executor, the defendant. But it is quite immaterial that *Pocock* did not execute the deed of assignment from the provisional assignee, for it is found by

(a) June 7th, before Lord Denman C.J., *Littledale, Patterson, and Williams* Js.

(b) 5 B. & Ad. 368; S. C. 2 N. & M. 745.

the jury that he assented to the deed, and that he acted as assignee. The term then, having vested in *Pocock*, on his death passed to the defendant; for although section 14 of 1 Geo. 4, c. 119, (the act in force at the time of this assignment, in the case of an assignee's death,) enables the Court, on the application of a creditor, to appoint a fresh assignee, in whom the insolvent's effects immediately vest, yet in default of such appointment, as in this case, they vest in the deceased assignee's executor.

1838.  
  
 ABERCROMBIE  
 v.  
 HICKMAN.

*Platt*, *contra*. 1. The witness was incompetent, for he had a most direct interest in the object of the suit, which was not only to recover a fund for present payment of the annuity, but also to re-establish and continue the very subject-matter on which that annuity was charged. The very sum to be recovered was ear-marked, as it were; for the trustees would be compelled to appropriate one part of it to payment of the annuity, and the other to the reparation of the premises. It seems also very material, although there certainly is a dictum of *Parke J.* to the contrary in *Nowell v. Davies (a)*, that no evidence was given to shew the solvency of the estate. Thus it might have depended entirely on the result of the trial whether the witness would be paid the annuity. 2. The deed of assignment executed by the provisional assignee to *Pocock*, and his mere assent thereto, were not sufficient to vest in him the insolvent's estate. Could he on such a title have brought an action on behalf of the insolvent? But even if the premises in question did vest in *Pocock*, he held a mere personal appointment under the Insolvent Debtors' Act, and on his death they would devolve to his executor. This appears from the 14th section of 1 Geo. 4, c. 119, which has already been cited. The recent Insolvent Debtors' Act also, 7 Geo. 4, c. 57, s. 38, contains the same provision.

*Cur. adv. vult.*

(a) 5 B. & Ad. 368; S. C. 2 N. & M. 745.

1838.

ABERCROMBIE

v.

HICKMAN.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action of covenant by a lessor against the executor of the assignee of his lessee, an insolvent, for non-payment of rent accrued due since the testator's death. We felt some doubt whether the action could be maintained against the executor, from a provision in the Insolvent Debtors' Acts, which may be thought to import that the appointment of such assignee is a mere personal trust; we mean the power vested in the Insolvent Commissioners to appoint a new assignee on the death of him formerly appointed. But upon full consideration, and on referring to *Blaxam v. Hubbard* (a), *Aldritt v. Kettridge* (b), *Ex parte Bainbridge* (c), decided under the Bankrupt Act, 5 Geo. 2, c. 30, we think the executor is liable, as representing the assignee, if the latter acted as tenant of the premises demised, as well as assented to the assignment.

But the evidence by which this fact was established was objected to as proceeding from a witness who was said to be inadmissible, by reason of his interest in the result of the suit. That witness was the husband of a lady who was entitled to an annuity charged on the premises, which were vested in the plaintiffs as trustees. The annuity was settled to the separate use of the wife, and afterwards for the benefit of the children. It was argued that the witness therefore, through the interest of his wife in those premises, was interested in fixing the defendant with this rent, that the security for the annuity might be the ampler. But this objection is obviously untenable, for in whatever person the lease may be vested, the rent must be paid; and the interest of the witness, if any, is far too remote to render him incompetent. This rule therefore must be discharged.

Rule discharged.

(a) 5 East, 407.

Bing. 355.

(b) 6 B. Moore, 569; S. C. 1

(c) 6 Ves. 451.

1838.

## The QUEEN v. HUMPHERY.

**QUO** warranto for the office of alderman of the city of London.

Plea, that the city of London is, and from time immemorial hath been an ancient city, and that the citizens and freemen of the said city, during all that time, have been, and that they now are, a body politic and corporate &c., and that within the said city, from time whereof &c., there have been and still are divers wards (and amongst others the ward of Aldgate in the said city), and divers citizens and freemen of the said city, who have been, and have been called aldermen of the said city; that is to say, one alderman for each of the said wards; that the office of alderman hath been and still is a public office, &c. That from time whereof &c. there of right hath been and still ought &c. to be within the said city, a certain court of record, called the Court of Mayor and Aldermen of the said City of London, holden in the Guildhall of the said city, according to the custom &c., before the mayor of the said city for the time being, or his locum tenens, and the aldermen thereof, or at least twelve others of the said aldermen, at such time as has seemed meet to the mayor of the said city for the time being, upon due notice previously given &c., for the purpose of consulting about and transacting lawful and necessary affairs concerning the good government of the said city, and also for the purpose of admitting and swearing into the place and office of alderman such persons as have been duly elected thereto, and are properly qualified to fill the said office, according to the custom &c. That from time whereof &c., and still of right &c., certain assemblies or courts called wardmote courts, have been of right holden from time to time, on divers days in each of the said wards within the said city, for (amongst other things) the election by the inhabitants of the said wards, at the said wardmote courts, of divers

*Thursday,  
June 14th.*

A party elected to a corporate office has a right to be admitted previously to making the declaration required by the 9 Geo. 4, c. 17, s. 2, to be made "within one calendar month next before or upon his admission."

1838.  
  
 The QUEEN  
 v.  
 HUMPHREY.

persons into divers places and offices, and, amongst others, into the place and office of alderman in the said city, by virtue of precepts issued for such elections respectively by the mayor of the said city for the time being, to which respective precepts returns during all that time have been made, and of right ought &c., into the said court of mayor and aldermen. That from time whereof &c., there had been, and still of right ought to be within the said city, a certain court called the Court of Common Council, holden before the said mayor, or his locum tenens, and the aldermen of the said city for the time being, and the commons of the said city, or the major part of them, duly elected and chosen according to the custom of the said city in that behalf, being assembled together upon reasonable summons thereof previously given, according to the custom &c., which said commons so elected, together with the said mayor or his locum tenens, and aldermen, during all the time aforesaid, have been the common council of the said city, to consult of and upon all matters and things proposed in the common council concerning the said city &c. That the said mayor, or his locum tenens, aldermen, and commons, or the major part of them so assembled in common council aforesaid, during all the time aforesaid, have been used and accustomed, and have had and still have a right to make such reasonable ordinances, acts and bye-laws, as to them have seemed meet and convenient for the better government of the said city. That from time whereof &c.,—until the making and passing of a certain bye-law, or act of common council, on the 1st August, 21 Ric. 2, touching the election of aldermen of the said city, whereby it was ordained, that for the future, in the election of aldermen, two, at least, honest and discreet men should be chosen and presented to the mayor and aldermen, so that either of them whom they should choose might be admitted and sworn; and also after making and passing of a certain other bye-law or act of common council, on the 15th April, 13 Anne, " An Act for reviving the ancient manner of

electing Aldermen," whereby, after reciting (amongst other things), that by the ancient usage and custom of London, when any ward of the said city became vacant and destitute of an alderman, the inhabitants of the ward having a right to vote in such elections were wont to choose one person only to be alderman of the said ward, for reviving the said ancient custom, and restoring to the said inhabitants their ancient rights and privileges of choosing one person only to be their alderman, it was enacted, that from thenceforth, in all elections of aldermen of the said city, at a wardmote to be holden for that purpose, there should be elected, according to the said ancient custom, only one able and sufficient citizen and freeman of the said city, not being an alderman, to be returned to the court of mayor and aldermen, which person so elected should be by them admitted and sworn well and truly to execute the said office of alderman—and from thence hitherto the aldermen of the divers wards of the said city, and, amongst others, of the said ward of Aldgate, have of right been elected and chosen at such wardmote courts as aforesaid, holden as aforesaid in the said respective wards by virtue of such precepts as aforesaid, one alderman for each ward.

The plea then set out sections 2, 3 and 4 of the 9 Geo. 4, c. 17, intituled "An Act for repealing so much of several Acts as impose the necessity of receiving the Sacrament, &c. as a Qualification for certain Offices, &c.(a)" and stated,

(a) Sect. 2. That every person who shall hereafter be placed, elected, or chosen in or to the office of mayor, alderman, recorder, bailiff, town-clerk, or common councilman, or in or to any office of magistracy or place, trust or employment relating to the government of any city, corporation, borough, or cinque port within England and Wales, or the town of Berwick-upon-Tweed, shall,

within one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following:—

"I, A. B., do solemnly and sincerely, in the presence of God, profess, testify, and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence which I may possess by virtue of the office

1838.

The QUEEN  
v.  
HUMPHREY.

1838.  
  
 The QUEEN  
 v.  
 HUMPHREY.

that since the passing of the said act the said court of mayor and aldermen have required of every person who since the passing of the said act has been elected to the office of alderman of any ward of the said city, that such person should make and subscribe the said declaration prescribed by the said act previously to taking and subscribing the oaths of office, according to the several laws made and now in force for that purpose at the said city.

That a vacancy having occurred in the office of alderman of the ward of Aldgate aforesaid, by the death of *John Thomas Thorpe*, Esq., late alderman thereof, a court of wardmote was holden on the 17th November, 1835, and continued by adjournment on other subsequent days, before the mayor of the said city, by virtue of a certain precept for that purpose before then duly issued, according to the custom of the said city, for the election of an alderman of the said ward, in the room of the said *J. T. Thorpe*, at which said court one *David Salomons*, the said

of , to injure or weaken the Protestant Church as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy, are or may be entitled."

S. 3. And be it enacted, That the said declaration shall be made and subscribed as aforesaid, in the presence of such person or persons respectively, who by the charters or usages of the said respective cities, corporations, boroughs, and cinque ports, if such there be, or otherwise in the presence of two justices of the peace of the said cities, corporations, boroughs, and cinque ports, if such there be, or otherwise, in the presence of two justices of the peace

of the respective counties, ridings, divisions or franchises wherein the said cities, corporations, boroughs, and cinque ports are; which said declaration shall either be entered in a book, roll, or other record, to be kept for that purpose, or shall be filed amongst the records of the city, corporation, borough, or cinque port.

S. 4. That if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed.

defendant, and one *James Law Jones*, were candidates for the said vacant office. That at the said last-mentioned court of wardmote divers inhabitants of the said ward, being a majority of those then present at the said court, voted for the said *D. Salomons*, as and for such alderman, and by reason thereof the said *D. Salomons* claimed to be duly elected to the said office; and a return to the said precept, and of the result of such election, was afterwards, to wit, on the 24th November, 1835, made unto the said court of mayor and aldermen.

That afterwards, to wit, on the 3rd day of December, 1835, at a court of mayor and aldermen then holden at the Guildhall, in and for the said city, the said *D. Salomons* did tender himself to the said court of mayor and aldermen, at the said last-mentioned court, for admission, and did then and there make claim, and did require to be admitted to the said office of alderman of the said ward of Aldgate as aforesaid; and that thereupon the said *D. Salomons* was then and there requested by the court of mayor and aldermen to make and subscribe in their presence the said declaration in the said act mentioned, the said mayor and aldermen then being the persons in the presence of whom, by the usage of the said city, the said declaration should be made and subscribed according to the provisions of the said act of parliament in that behalf, according to the several laws made and now in force for that purpose; but that the said *D. Salomons* did not nor would, at the said court of mayor and aldermen so holden as last aforesaid, nor at any time *within one calendar month next before or upon his admission, according to the true intent and meaning of the said act*, into the said office of alderman of the said ward of Aldgate as aforesaid, nor at any other time whatsoever, make and subscribe the said declaration, but wholly omitted and neglected so to do; by reason whereof, and by force of the said statute in that case made and provided, the election and choice of the said *D. Salomons* into the said office of alderman of the said ward of Ald-

1838.

The QUEEN  
v.  
HUMPHREY.

1838.  
  
 The QUEEN  
 v.  
 HUMPHREY.

gate as aforesaid, became and was void. That the said *D. Salomons*, so having omitted and neglected to make and subscribe the said declaration required by the said act of parliament, the said court of mayor and aldermen, so holden as last aforesaid, did thereupon, at the said last-mentioned court, declare and adjudge the election of the said *D. Salomons* into the said office of alderman of the said ward of Aldgate as aforesaid to be void, and did also then and there resolve that a fresh precept should issue for a court of wardmote to be held for the election of a fit and proper person to be alderman of the said ward of Aldgate, in the room of the said *J. T. Thorpe*. That the *said vacancy not having been filled up*, a certain other court of wardmote was holden on the 8th December, 1835, for the said ward of Aldgate, before the mayor of the said city, by virtue of a *certain other precept* for that purpose before then duly issued, according to the custom of the said city, for the election of an alderman of the said ward, in which said last-mentioned precept it was stated that *D. Salomons*, returned to the court of mayor and aldermen to be alderman of the said ward, had omitted and neglected to make and subscribe the declaration directed to be made by the said act, by reason whereof the said election of the said *D. S.* had, by virtue of the said act, become void. That at the said last-mentioned court of wardmote this defendant was the only candidate for the said office &c., and that divers inhabitants &c., being a majority &c., voted for the defendant as such alderman, and by reason thereof defendant was duly elected &c., and a return to the said last-mentioned precept, and of the result of such last-mentioned election, was afterwards, to wit, on the 17th December, 1835, made into the said court of mayor and aldermen then holden in the Guildhall, &c. The plea concluded by stating, that at the said last-mentioned court, defendant having made the declaration prescribed by the said act, was then and there duly sworn and admitted into the office &c.; and also then and there took and subscribed the oaths, and made and

subscribed the declaration according to the several laws made for that purpose, by reason of which several premises the defendant took upon himself the said office &c., and from thence continually, until the time of exhibiting the said information, has been and is one of the aldermen of the said city. Verification.

Replication. That by the said act of the said court of common council, passed the 15th April, 13 *Anne*, it was also enacted, that in case the person so duly elected alderman, and returned by the lord mayor, or other person duly authorized to hold such wardmote, to the said court of mayor and aldermen, within the time for that purpose by the laws of the said city limited and appointed, should refuse to take upon him the said office, and unless he could discharge himself therefrom by the laws of the said city, he should be subject to all the pains and penalties which might be inflicted on him by the bye-laws and customs of the said city. That by an act of the said court of common council, holden at &c. the 17th April, 52 *Geo. 3*, intituled &c., it was enacted, that upon any vacancy, by death or resignation, of any person being an alderman of the said city, the lord mayor should, within eight days next, Sundays excepted, cause a wardmote to be duly summoned for the election of a fit person to be alderman of such ward where such vacancy should happen, and returning such person so elected. The replication then stated, that by the said act of common council it was also enacted, that if any person duly elected alderman &c., should not, after notice of such election, appear before the next court of mayor and aldermen, and then and there take upon himself the said office, or if, before the said court, he should refuse to take upon himself the said office, he should forfeit 500*l.*, unless he should be duly discharged of the said office for defect of ability in wealth, upon oath taken. That after the said return to the said precept was made to the said court of mayor and aldermen, a certain notice in writing was served upon the said *D. Salomons*, to appear before the said court on the

1838.

The QUEEN  
v.  
HUMPHREY.

1838.

  
The QUEEN  
v.  
HUMPHREY.

3rd December last, at the Guildhall &c., and then and there to take upon himself the said office of alderman of the said ward; and that in pursuance of the said notice he did, on the 3rd December, and *within the space of one month next after the day of his election*, present himself to the said court of mayor and aldermen, and then and there expressed his readiness to be sworn for the due execution of the said office of alderman, and also to take and subscribe the oaths according to the said laws made for those purposes, and to take upon himself the duties of the said office, and did there demand to be admitted alderman. That when he so appeared and presented himself to the said court, the said court demanded of him the said *D. Salomons* whether he had signed the declaration required by the said act of 9 *Geo.* 4, c. 17, within the space of one month next before his then application for admission; to which the said *D. S.* then answered that he had not; whereupon the said court demanded of him, the said *D. S.*, whether he would make and subscribe the said declaration; whereupon he declined to say whether he would or not, but required the said court of mayor and aldermen to admit him to the said office, which the said court of mayor and aldermen did then and there, *and within the space of one month from the day of the election* of the said *D. S.*, positively refuse to do; and the said court did then and there declare the election of the said *D. S.* to be null and void; and thereupon directed a precept to issue from the said court for the election of another alderman for the said ward of Aldgate. That afterwards, to wit, on the 5th December, and within the space of one month next after the election of the said *D. S.*, a certain precept issued from the said court of mayor and aldermen, and that by virtue thereof a certain court of wardmote was, on the 8th of the said month, and within the space of one month next &c. holden for the said ward &c., for the purpose of electing an alderman of the said ward, at which wardmote the defendant was elected. Verification.

General demurrer and joinder.

In the margin of the paper-book it was stated, that in support of the information it would be contended—

1838.  
  
 The QUEEN  
 v.  
 HUMPHREY.

1. That the court of aldermen was not justified in insisting upon the making or subscription of the declaration by Mr. *Salomons*, as a condition precedent to his admission into the office of alderman, and that he was not legally bound to make or subscribe it at the time he was required so to do.

2. That by the 9 *Geo. 4*, c. 17, one calendar month is allowed to the person elected for making or subscribing the declaration, and that a month not having elapsed from the election of Mr. *Salomons*, when he was called upon to make or subscribe the declaration, he was not then bound to make or subscribe it, and the court of aldermen was not justified in declaring his election null and void.

3. That the lord mayor was not justified in issuing his precept for a new election before the expiration of one month from the election of Mr. *Salomons*, and that the election of the defendant was therefore illegal and void.

4. That by the 5 & 6 *Will. 4*, c. 11 (the Annual Indemnity Act), the time for subscribing the declaration was extended to the 25th March, 1836.

Sir *J. Campbell* A. G. (with whom was *R. V. Richards*), in support of the demurrer (a). The 9 *Geo. 4*, c. 17, s. 2, which is set out on the pleadings, required Mr. *Salomons* to make the prescribed declaration within one calendar month next before or upon his admission; and the question is, whether he, having refused to make such declaration on his attendance before the court of aldermen, and having also then confessed that he had not made it within a month previously, had any right to be admitted an alderman. If he had, the above act is practically repealed. The whole

(a) In Easter term, April 25 and 27, before Lord *Denman* C. J., *Lit-  
tledale*, *Patteson*, and *Coleridge* Js.

1838.

The QUEEN  
v.  
HUMPHREY.

question turns upon the meaning of the words "within one calendar month next before or upon his admission." The court of aldermen had a right to insist upon Mr. *Salomon's* making the declaration before they admitted him, because although the 4th section of the 9 *Geo.* 4, c. 17, avoids his election if he do not make the declaration, yet, if he were once admitted, the Annual Indemnity Act would have the effect of protecting him from that section. It may be said that the Court cannot take notice that there will be an Annual Indemnity Act; but such an act has passed for nearly a century, and of this the legislature were aware when they passed the 9 *Geo.* 4, c. 17, s. 2, so that they must have intended the declaration to be made before admission. The 5 & 6 *Will.* 4, c. 28, was passed to set aside this very provision of the 9 *Geo.* 4, so far as respected the office of sheriff for counties, and to enable Mr. *Salomons* to fill the office of sheriff of London. This would have been quite unnecessary, according to the construction put on the words "upon admission" by the relator. The word "upon," it must be admitted, does not always mean "before;" it may also mean "after," or "concurrently with," as where a rule is made "upon" reading affidavits. But it is most consonant to the spirit and the terms of the different clauses of this act to construe it in this case to mean "before." Sections 2, 3, and 4, prescribe what must be done before admission, and the 5th prescribes what must be done after admission. The declaration under the 2nd section is substituted for the sacramental test, (under the 13 *Car.* 2, stat. 2, c. 1, s. 12) which was expressly required *before* admission; and it is therefore probable that the declaration substituted for it is to be made at the same time. In the 10 *Geo.* 4, c. 7, ss. 2 and 4, there is a similar provision as to Roman Catholics, who are expressly disabled from sitting in Parliament until after they have taken the oath prescribed; and ss. 14 and 19 of that act apply the same provision to Roman Catholics elected in corporate offices. The test *after* admission, required by the 25 *Car.* 2, c. 2, is replaced by the

declaration to be made under a different section of the 9 Geo. 4, c. 17, namely, the 5th.

Another point made for the crown is, that the election of Mr. *Salomons* was avoided prematurely, as there should have been given him, after his election, a month within which to comply with the requisitions of the act. But no such inference can be drawn from the language of the legislature, who never supposed that a party, during the month after his election, was likely to become a convert to a different faith. It was simply intended, if he had made the declaration within a month *before* his admission, that he should be excused from repeating it on his admission.

It cannot be said that the Annual Indemnity Act (a) extended the time for making the declaration until the 25th March, 1836, for that act only applies to cases where an officer has been admitted, and has incurred a penalty for his default, as in *Rex v. Perry* (b) and *In re Steavenson* (c); and he must shew, before he can have the benefit of the act, that he has made the declaration; whereas the replication in this case does not state that Mr. *Salomons* either has made, or that he is ready to make, such declaration.

Sir *F. Pollock* (with whom were Sir *W. W. Follett*, *Wightman* and *Shee*), *contra*. The question is not, as stated on the other side, whether *Salomons* had a right to be admitted before declaration, but whether the court of aldermen had "then and there" the right to issue a new precept. It is submitted that the precept for a new election was prematurely issued at a time when the office was full by the election of Mr. *Salomons*. The court of aldermen declared his election void at the court held on the 3d December, when he refused to make the declaration. But he had the whole of that day for the purpose; if the Court sat from 10 A.M. till 4 P.M., he had a right to be admitted at the first sitting of the court, and might have made the declara-

1838.

The QUEEN  
v.  
HUMPHREY.

(a) 5 &amp; 6 Will. 4, c. 11.

(c) 2 B. &amp; C. 34.

(b) 14 East, 549.

1838.

The QUEEN  
v.  
HUMPHREY.

tion at any time before the rising of the court, and they could not take notice of his default, if any, until the next court. The court, however, at their first meeting, voted his election void. At what particular moment was it void? Their mere vote could not make it so.

But Mr. *Salomons* was not guilty of any default, for "upon admission" does not signify before admission. In *Johnson's Dictionary*, one of the meanings given to the word "upon" is "at the time of," but he gives no example of its use in the sense of "before." Where a statute inflicts a penalty "upon conviction," it does not mean that a party is to pay the penalty first and to be convicted afterwards. The very form of the declaration, that the party will not exercise any power which he may possess "by virtue of the office of" &c., indicates that the admission to the office must have been previously completed. If Mr. *Salomons* committed any default, he would have had to take the consequences imposed by the fourth section of the 9 *Geo.* 4; his office would have been void.

Sir *J. Campbell* A. G., in reply. It seems admitted that the Annual Indemnity Act has no application to the present case; but it is asked at what particular time the vacancy occurred. It occurred when Mr. *Salomons* refused to make the declaration: his default was then consummated. [Lord *Denman* C. J. What is the meaning of "in default of such," in the third section of the 9 *Geo.* 4?] It means that, in case the party elected shall not make the declaration before the persons who by charter administer the oath for the due execution of the office, that is, before the aldermen in this case, it shall be enough if he has already made it, within the month, before two justices. If the words "upon admission" mean at the time of admission, there must be an option to be exercised somewhere whether the declaration or the admission is to have the priority, and that option was properly claimed by the court of aldermen, who had an inherent right, the act itself being silent on the

subject, to regulate the order in which their proceedings should succeed each other.

1838.

*Cur. adv. vult.*

The QUEEN  
v.  
HUMPHREY.

Lord DENMAN C. J., on a former day in this term (a), delivered the judgment of the Court.—The question which the Court has to decide in this case is, whether the court of aldermen of the city of London were right in refusing to admit Mr. *Salomons* as alderman of the ward of Aldgate, for which he had been duly elected, and in issuing a precept for a new election, under the authority of which the defendant was elected. The court refused to admit Mr. *Salomons* to the office on the ground of his default to make the declaration, under the 9 *Geo. 4*, c. 17, s. 2, antecedently to his admission. We are of opinion that the court ought to have admitted him previously to calling upon him to make the declaration, that there was no vacancy when the precept for a new election was issued, and that consequently it was issued improperly.

### Judgment for the Crown.

(a) June 29.


### POOLE and another v. WARREN.

Saturday,  
June 9th.

**DEBT** for double value under the 4 *Geo. 2*, c. 28. The declaration stated that the defendant held certain premises as tenant to the plaintiffs, for the remainder of a term of years ending the 25th of June, 1834; that plaintiffs, upon the receiver, agent, and attorney of the mortgagors, to receive the rents until satisfaction of the mortgage, to bring actions in case of non-payment of rent, to give notices to quit, to bring ejectment in case of non-compliance &c., as fully as the mortgagors might have done, is a sufficient authority to him to demand possession of tenants, under 4 *Geo. 2*, c. 28, s. 1, so as to make them liable in double value for holding over.

1. A joint authority given by mortgagor and mortgagee of premises to a person to be

2. Where an instrument is proved by a copy, as secondary evidence, from which it appears that the original was subscribed by an attesting witness, it is nevertheless unnecessary to call him.


1838.  
  
 POOLE  
 and another  
 v.  
 WARREN.

the expiration of the term, gave notice in writing to the defendant, and in writing demanded of him, and required him to deliver up the premises, and that defendant wilfully held over. The third plea alleged, that plaintiffs did not give notice in writing to defendant, nor did they in writing demand of him or require him to deliver up possession of the said premises.

At the trial before Lord *Denman* C. J. at the London sittings after Michaelmas term, 1836, a copy was produced as secondary evidence of the notice to quit, which had been given in the name of one *Grellett*. It appeared from the copy that the original had the name of an attesting witness subscribed to it, and it was objected that the rules of evidence equally required his testimony, whether the instrument were proved by the production of the original or of a copy; and *Doe d. Sykes v. Durnford* (a) was cited. His lordship admitted the evidence, but reserved the point. In order to shew the authority of *Grellett* to give the notice, deeds were put in, from which it appeared that the premises in question had been the property of one *Keating* and his wife, by whom they had been mortgaged to Sir *J. Astley* and others. A deed of the 25th of July, 1833, to which the *Keatings* as mortgagees, the plaintiffs, and *Grellett* were parties, was then proved. This deed, after a transfer of the mortgage and assignment of the premises to the plaintiffs, contained an appointment by all parties to the deed, of the said *Grellett* to be the receiver, agent, and attorney of the *Keatings*, to receive the rents and profits of the premises until the mortgage was fully satisfied; and for that purpose to adjust all differences and accounts with the tenants, to bring actions in case of non-payment of the rents, to give notices to quit, and in cases of non-compliance to bring ejectment, to grant leases, and to do all other matters concerning the said premises, as fully and effectually to all intents and purposes as the *Keatings*, their executors, administrators, or assigns might have done if the said deed

(a) 2 M. & S. 62.

had not been executed. It was then objected that this deed did not contain a sufficient authority to *Grellett*, under the statute, to give the notice in question; for which purpose he should have had a specific authority from the plaintiffs themselves, who had the legal estate in the premises. His lordship being of this opinion, directed a verdict on this issue for the defendant, but gave leave to move to enter the verdict for the plaintiffs.

1838.  
  
 POOLE  
 and another  
 v.  
 WARREN.

*Kelly*, in Hilary term, 1837, having obtained a rule nisi,

*E. V. Williams* now shewed cause, and, in support of the first objection, cited *Call v. Dunning (a)*, *Doe d. Sykes v. Durnford (b)*, *Higgs v. Dixon (c)*, and *Gillies v. Smither (d)*. With regard to the second objection, he attempted to distinguish this case from *Wilkinson v. Colley (e)*, on the ground that here the demand of possession was made simply after the determination of the tenancy by effluxion of time, whereas in that case, notice to quit also had been given previously.

The COURT (*f*), however (stopping *Kelly*), held, that *Cooke v. Tanswell (g)* was decisive against the first objection, and that, as to the second objection, the case had not been distinguished from *Wilkinson v. Colley (e)*.

Rule absolute.

(a) 4 East, 53.

(b) 2 M. & S. 62.

(c) 2 Stark. N. P. C. 180.

(d) 2 Stark. N. P. C. 528.

(e) Burr. 2694.

(f) Lord Denman C. J., *Little-  
dale, Patteson, and Williams Js.*

(g) 8 Taunt. 450.



1838.

Thursday,  
June 14th.

Where, from a very remote period, a franchise has been exercised

without opposition, and it is probable, under all the circumstances of the case, that it emanated from a grant by the crown,

and would have been frequently questioned, if not referable to some legal origin, and has been partly recognized in ancient statutes, the Court will not direct a quo warranto to try its validity, because such legal origin cannot be distinctly traced, and discharged a rule, under these circumstances, obtained for an information against the Vice-Chancellor of the University of Cambridge, to shew by what authority he granted alehouse licences.

*Quere*, was this a subject for a quo warranto?

### THE QUEEN v. ARCHDALL, D.D.

A RULE nisi had been obtained for a quo warranto against the defendant, Vice-Chancellor of Cambridge, to shew by what authority he claimed to grant alehouse licences.

Sir *W. W. Follett*, *Starkie*, and *Cowling*, shewed cause (a).

Sir *J. Campbell* A. G., *Kelly*, and *Waddington*, supported the rule.

*Cur. adv. vult.*

LITTLEDALE J. on this day delivered the judgment of the Court.—This was a rule for a quo warranto information to be filed against the Rev. Dr. *Archdall*, Master of Emanuel College in, and lately Vice-Chancellor of, the University of Cambridge, to shew by what authority he had taken on himself to grant alehouse licences. It was moved on the part of the justices of the borough of Cambridge, for the purpose of contesting the right claimed by the Vice-Chancellor, of granting such licences within the liberties and precincts of the University. It was argued in the last term before my brothers *Patteson*, *Coleridge*, and myself, at great length, and with great ability and research. We have taken time to look into the affidavits, and I am now to pronounce our judgment.

In the course of the argument, principally in consequence of a doubt thrown out by the Court, the question, whether this was a proper subject for a quo warranto, was much considered by the counsel who argued in support of the rule: but it is unnecessary for us to pronounce any opinion on that question, as our judgment will not proceed upon it;

(a) In Easter term, 1838, April 30 and May 2, before *Littledale*, *Patteson*, and *Coleridge* Js. Lord *Denman* C.J. was absent at the Privy Council. It has been

thought unnecessary to give any statement of the facts and arguments relied on, as they sufficiently appear from the judgment of the Court.

and we decline to do so the rather, because the counsel who shewed cause against the rule scarcely noticed the point in argument, relying entirely upon the facts.

Turning then to the affidavits, it appears to be unquestionable that the Vice-Chancellor of Cambridge has exercised this franchise from a very remote period; from a period indeed so remote, that the first exercise of it cannot be distinctly traced, nor the origin to which it is referable at all certainly assigned: and that he has exercised it not merely within the borough of Cambridge, but without it, and in the county, to the extent of the known liberties of the University. The history of alehouse licences, as granted by justices of the peace, is well known; it takes its commencement from the 5 & 6 *Edw.* 6, c. 25, but the mode of proceeding by the Vice-Chancellor has never borne express reference to any authority given by the statute, nor squared with its provisions in form or substance. He has described himself, indeed, as a justice of the peace, and he has acted with another head of a house described in the same way; but the latter is called his assistant only, the licence is stated to proceed from himself, and is under his single seal and signature; it is granted during good pleasure, is subject to other conditions than those of a magistrate's licence, and the recognizance has never been certified to the quarter sessions. It further appears that this privilege has been recognized with more or less distinctness in a great number of public statutes, some of them going back to a distant period; one (the 9 *Ann.* c. 25, s. 50,) passed considerably more than a century since, in very clear language recognizing and confirming it. Lastly, it appears that during the whole of this period the University has been placed side by side, as it were, with a municipal body of considerable power, and that between the two, differences have from time to time prevailed, and much jealousy been manifested as to conflicting privileges; yet until very modern times no resistance entitled to serious consideration has been made by the borough to the exercise of

1838.  
  
 The QUEEN  
 v.  
 ARCHDALL.

1838.

The QUEEN  
v.  
HUMPHREY.

3rd December last, at the Guildhall &c., and then and there to take upon himself the said office of alderman of the said ward; and that in pursuance of the said notice he did, on the 3rd December, and *within the space of one month next after the day of his election*, present himself to the said court of mayor and aldermen, and then and there expressed his readiness to be sworn for the due execution of the said office of alderman, and also to take and subscribe the oaths according to the said laws made for those purposes, and to take upon himself the duties of the said office, and did there demand to be admitted alderman. That when he so appeared and presented himself to the said court, the said court demanded of him the said *D. Salomons* whether he had signed the declaration required by the said act of 9 *Geo.* 4, c. 17, within the space of one month next before his then application for admission; to which the said *D. S.* then answered that he had not; whereupon the said court demanded of him, the said *D. S.*, whether he would make and subscribe the said declaration; whereupon he declined to say whether he would or not, but required the said court of mayor and aldermen to admit him to the said office, which the said court of mayor and aldermen did then and there, *and within the space of one month from the day of the election* of the said *D. S.*, positively refuse to do; and the said court did then and there declare the election of the said *D. S.* to be null and void; and thereupon directed a precept to issue from the said court for the election of another alderman for the said ward of Aldgate. That afterwards, to wit, on the 5th December, and within the space of one month next after the election of the said *D. S.*, a certain precept issued from the said court of mayor and aldermen, and that by virtue thereof a certain court of wardmote was, on the 8th of the said month, and within the space of one month next &c. holden for the said ward &c., for the purpose of electing an alderman of the said ward, at which wardmote the defendant was elected. Verification.

General demurrer and joinder.

In the margin of the paper-book it was stated, that in support of the information it would be contended—

1. That the court of aldermen was not justified in insisting upon the making or subscription of the declaration by Mr. *Salomons*, as a condition precedent to his admission into the office of alderman, and that he was not legally bound to make or subscribe it at the time he was required so to do.

2. That by the 9 *Geo.* 4, c. 17, one calendar month is allowed to the person elected for making or subscribing the declaration, and that a month not having elapsed from the election of Mr. *Salomons*, when he was called upon to make or subscribe the declaration, he was not then bound to make or subscribe it, and the court of aldermen was not justified in declaring his election null and void.

3. That the lord mayor was not justified in issuing his precept for a new election before the expiration of one month from the election of Mr. *Salomons*, and that the election of the defendant was therefore illegal and void.

4. That by the 5 & 6 *Will.* 4, c. 11 (the Annual Indemnity Act), the time for subscribing the declaration was extended to the 25th March, 1836.


Sir *J. Campbell* A. G. (with whom was *R. V. Richards*), in support of the demurrer (a). The 9 *Geo.* 4, c. 17, s. 2, which is set out on the pleadings, required Mr. *Salomons* to make the prescribed declaration within one calendar month next before or upon his admission; and the question is, whether he, having refused to make such declaration on his attendance before the court of aldermen, and having also then confessed that he had not made it within a month previously, had any right to be admitted an alderman. If he had, the above act is practically repealed. The whole

(a) In Easter term, April 25 and 27, before Lord *Denman* C. J., *Lit- tledale*, *Patteson*, and *Coleridge* Js.

1838.

The QUEEN  
v.  
HUMPHREY.

1838.

  
The QUEEN  
v.  
ARCHDALL.

vassing a modern grant, without making allowance for the changes and accidents of time, no ancient title will be found free from objection—that indeed will become a source of weakness, which ought to give security and strength. It has therefore *always* been the well-established principle of our law to presume every thing in favour of long possession, and it is every day's practice to rest upon this foundation the title of the most valuable properties.

We should be departing from this principle and practice if we were now to institute the inquiry prayed for, and call upon the Vice-Chancellor to justify the exercise of this ancient franchise. It is possible that it may rest upon no legal foundation, and that upon a full examination it may turn out to be incapable of being supported. By refusing this rule, we do not prevent the parties from raising the question, if they shall be so advised, nor prejudice its determination; we decline only to render any assistance in originating the proceeding, which may imply a suspicion in our minds, that what has existed unquestioned for centuries is referable only to usurpation on the crown.

Upon these grounds we do not examine minutely the several objections above enumerated; they are of more or less weight, and have received answers more or less satisfactory. The principle of our decision would lead us to the same conclusion, even if we should think that many of them remained entirely unanswered. We were pressed with the anomalous nature and inconvenience of this jurisdiction, under the altered circumstances of the times, especially that the power claimed was irresponsible in its exercise, and liable to no appeal. This, however, is a matter with which we have no concern. If abuses are found to exist, for which the law gives no remedy; or if the franchise be found objectionable in theory, or unsuited to the present times, application must be made elsewhere. The only question for us is, whether, under the circumstances, sufficient doubt has been raised in our minds as to the lawfulness of its present title, to make it proper for us to direct

the information to be filed. That has not been done, and this rule will therefore be discharged.

Rule discharged.

1838.  
The QUEEN  
v.  
ARCHDALL.

DOE *d.* CLARKE and others v. STILLWELL and others.

Thursday,  
June 14th.

IN this case, by an award, afterwards made a rule of Court, the arbitrator directed as follows:—That the defendant *Stillwell*, “in consideration of the sum of 15*l.*, shall forthwith, at the costs and charges of the said *T. T. Clarke*, out of court, according to the custom of the manor of Tokenham aforesaid, surrender to the use of the said *T. T. Clarke*, his heirs and assigns, the said piece of land,” &c. By the terms of the reference the award was to be published by the 1st January, 1837: it concluded thus;—“In witness whereof I have set my hand this 23rd day of December, 1836.

“Signed and published in  
the presence of” *C. D.*

(Signed) *A. B.*

An affidavit of the subscribing witness, sworn the 4th May, 1837, stated that he saw the arbitrator sign, publish and declare his award. It appeared from other affidavits, that on the 21st April, 1838, *Stillwell* was served with a copy of the rule of Court, of the award, and of an affidavit of its due execution; was required to perform the award, and was told “that upon such surrender being made by her as aforesaid, and delivered to the said *T. T. Clarke*, he, the said *T. T. Clarke*, should and would thereupon pay to her the said several sums of 15*l.* &c., and would also pay the costs and charges of and incident to the making of the said surrender. It appeared also, from an affidavit sworn on the 9th May, 1838, that up to that time *Stillwell* had not complied with the award by making a surrender. A rule nisi

render to him an estate, and defendant was afterwards informed that upon such surrender being made, she should thereupon be paid the said sum and the costs of the surrender:—Held, that she was in contempt for not making a surrender, although such sum and costs had not been paid.

1. An affidavit more than a year old may be used in moving for a rule.

2. Where an award purports, and is attested by a subscribing witness, to have been published on a certain day, who also makes an affidavit that he saw it published, but does not say when it was published, the Court will presume it to have been published on the day in question.

3. Where an award, under a rule of Court, directed that defendant, in consideration of a certain sum, should forthwith, at the costs and charges of the plaintiff, sur-

1838.

Doe

d.

CLARKE

v.

STILLWELL.

for an attachment against the defendant, for not performing the award, having been obtained on the 9th May, 1838,

*Knowles* now shewed cause. This rule is drawn up on an affidavit, made on the 4th May, 1837, of the due publication of the award, and was therefore more than a year old when the rule was obtained. No rule can be granted on so stale an affidavit: *Burt v. Owen* (a). [*Littledale J.* I never understood that there was any such rule of practice; and I find from the officers of the Court that it is perfectly new to them. *Wightman*, *amicus curiæ*, mentioned that he was in the case cited, and did not understand the Court to have laid down any such rule. *Patteson J.* There is such a rule as to an affidavit of debt, because after the lapse of a year it is presumed that the debt may be paid.]

Another objection is, that the award is not shewn to have been published by the 1st January, 1838, the time limited by the terms of the submission. The subscribing witness, on the 4th May, 1838, deposes that he saw the award published, but does not say when it was published. An award is not considered to be published until the parties have notice that it is ready for delivery: *Musselbrook v. Dunkin* (b).

Lastly, the affidavit of the defendant's disobedience is insufficient. There ought to have been shewn a regular demand on the defendant to perform the award, and a refusal on her part to do so. The costs of the surrender were to be paid by *Clarke*, and ought to have been tendered to the defendant, to put her in contempt for not making the surrender: *Standley v. Hemmington* (c).

Sir *J. Campbell A. G.*, and *Ogle*, *contrà*, (having been desired to confine themselves to the last point,) referred to the affidavit, stating that an offer had been made to the defendant to pay her costs on making the surrender; and contended therefore that the first act should have been hers.

(a) 1 Dowl. P. C. 691.

(c) 6 Taunt. 563.

(b) 9 Bing. 605.

LITLEDALE J. (a)—It is objected that the award is not shewn to have been made in due time; but it purports and is attested to be so made; and we must presume it was made according to the date on the face of it. It seems that, when the defendant was served with the rule, she was required to comply with the terms of the award. It is true the costs of the surrender would be paid by the surrenderee; but the defendant ought to have given notice that she would be ready to make the surrender at some certain time, and in what way, so that the surrenderee might know what costs to tender: *Hallings v. Connard* (b). It lay upon her to do the act, though the costs were to be paid by the other party.

1838.  
DOR  
d.  
CLARKE  
v.  
STILLWELL

PATTESON J.—I am of the same opinion. In the case just cited by my brother *Littledale*, where an assurance was to be made at the costs of the covenantee, it is added by *Walmsley J.* that, even where the manner of the assurance is ascertained, and not left to the option of the covenantor, it makes no difference; that he is to do the first act, and to make the assurance.

WILLIAMS J. concurred.

Rule absolute.

(a) Lord *Denman* C. J., not whole of the argument, gave no having been present during the opinion.  
(b) *Cro. Eliz.* 517.



# INDEX

TO THE

## PRINCIPAL MATTERS.

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### ACCORD AND SATISFACTION.

The plaintiffs having sued one of two obligors to a joint and several indemnity bond, after declaration, but while the damages were unliquidated, accepted from him 215*l.*, stating it, in a receipt, to have been accepted in discharge of the damages and costs in that action. The plaintiffs afterwards brought another action on the same bond against the other obligor, and recovered a verdict for 1098*l.* 14*s.* 11*d.* The Court held, that the composition in the former action was not a discharge of the whole damages on the bond, and refused to set aside the verdict. *Fidd v. Robins.* 226

### ACCOUNT STATED.

*Quære*, per Lord Denman C. J., whether a count, on an account stated, is demurrable for not averring the time when it was stated. *Webb v. Baker.* 87

### ACTION ON THE CASE.

See MASTER AND SERVANT, 1.

An act of parliament constituted a Company for the purpose of making and maintaining a canal to be passable for boats. All persons

were to be allowed to navigate the canal, and certain tolls were payable by them to the Company. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up within a certain time, that it should be lawful for the Company to do so, and to keep the same till payment were made of all expenses thereof:—Held, that the act was compulsory upon the Company, and that they were liable, in an action on the case, for an injury occasioned by their non-removal in due time of a sunken vessel. *Parnaby v. Lancaster Canal Company.* 523

### ADMINISTRATOR.

Where administration with the will annexed is granted to a person as the attorney of and for the benefit of the executor, such person represents the testator during the life of the executor, or until he take out probate.

Plaintiff declared as administrator with the will annexed of F., of the goods left unadministered by K., the executor, who was alleged to have proved the will by his attorney, to whom administration with the will annexed was granted

for the benefit of *K.*, which *K.*, since deceased, left *H.* his executor, whereupon administration with the will of *F.* annexed was granted to the plaintiff, for the benefit of *H.*; and stated in the first count, that defendants were indebted to *K.*, as executor as aforesaid, for interest of money forborne by him as such executor, and promised him as such executor; and in the second count, that defendants were indebted to the plaintiff as such administrator for interest, &c., and promised him as such administrator:—Held, that the first count was bad in arrest of judgment, as *K.* never was executor, and the promise of the defendants was in law to his attorney, to whom administration was granted; but that this grant was ipso facto at an end on the death of *K.*, and consequently the subsequent grant to the plaintiff good, who was entitled to recover under the second count all interest accruing after the grant to him. *Sewerdrop v. Day.* 670

#### AFFIDAVIT.

See CERTIORARI, 2—PRACTICE, 3.

An affidavit more than a year old may be used in moving for a rule. *Doë d. Clarke v. Stillwell.* 701

#### ALTERATION.

See BILLS AND NOTES.

The holder of an instrument is bound to prove that any alterations in it have been properly made. Where, therefore, a bill of exchange, the appearance of which left it uncertain whether it had been altered before or after issue, was submitted to a jury, with a direction, that if from its appearance they believed the alteration

to have been made before the bill was completed, and while the ink was wet, they should find for the plaintiff; the Court set aside a verdict so found, on the ground that the plaintiff should have shewn by extraneous evidence that the alteration was properly made. *Knight v. Clements and others.* 375

#### AMENDMENT.

See PLEADING, VI. 3.

In an action on a charter-party, where the contract is set out at length, and a promise is added as a formal statement of the legal effect of the contract:—Held, that the judge at nisi prius was right in ordering an amendment to be made, stating the legal effect correctly, although the defendant stated in his affidavit that he went down to try the issue contained in the averment ordered to be amended. *Whitwill v. Scheer.* 398

#### ANCIENT DEED.

Proof of proper custody of.—See EVIDENCE, VI.

#### APOTHECARY.

Whether an apothecary is entitled to recover for attendances as well as medicines, is a question of mere fact for the jury, taking into consideration the distances travelled, the number of attendances, the charge for medicines, and all the other circumstances of the case, from which a contract for reasonable compensation can be implied. *Morgan v. Hallen.* 498

#### APPEAL.

When not to be implied from statute.—See CHURCH, 1.

ARBITRATION.

See EVIDENCE, VIII. 4.

1. By a judge's order, which was afterwards made a rule of Court, all matters in difference in an action of ejectment, brought on two several demises, were referred to an arbitrator, the costs of the suit and reference to abide the event of the award, and the successful party to sign judgment as if the action had been tried at nisi prius, and to proceed in the usual way for the costs on such judgment. In August, 1837, the arbitrator awarded that the plaintiff was "entitled to a certain part of the lands sought to be recovered in the said action," namely, to a certain strip of land which he set out by metes and bounds. No attempt was made to set aside the award itself, but judgment having been entered up a rule was obtained by the defendants, in Hilary term, 1838, to set aside the judgment and to restrain execution:—Held, that the defendants must be confined to objections appearing on the face of the award, as if they were showing cause against a rule for an attachment.

Per *Littledale and Patteson Js.*, that the award was bad on the face of it, for want of finality, because it professed to deal with part only of the premises in question, and it did not appear that the residue had been taken into consideration.

Per *Patteson and Coleridge Js.*, that it was likewise bad for not stating on which of the two demises plaintiff had succeeded.

*Quere*, whether it was not incumbent upon the arbitrator to award to the plaintiff nominal damages. *Doe d. Madkins v. Horner and another.* 344

2. By an agreement for the sale of certain lands, it was stipulated

that the title should be made out to the satisfaction of a third person. A dispute as to the validity of the title was referred to an arbitrator, with power to settle all questions arising out of the agreement, who awarded that the title should be taken with a bond of indemnity in case of eviction:—Held, that the award was bad, because the arbitrator had exceeded his authority in ordering a bond of indemnity to be taken, and because he had not decided upon the validity of the title. *Ross v. Boards.* 382

ATTORNEY.

See PLEADING, III.—TRESPASS, 2.

1. The month, after the delivery of his bill, before an attorney can commence an action for its amount, under 2 *Geo. 2*, c. 23, s. 23, must consist of twenty-eight days, exclusively of both the day of delivering the bill and of commencing the action. *Blunt v. Heslop.* 553
2. The Court will not strike an attorney off the roll, on an affidavit alleging a distinct case of perjury, unless enough appears on his own admission to render the interposition of a jury unnecessary. *In re —.* 389

ATTORNMEN.T.

See STAMP, 3.

BANKRUPT.

1. Where a tenant, at a rent payable half-yearly, against whom a fiat of bankruptcy issues during a current half-year, delivers up possession of the premises to his landlord, according to 6 *Geo. 4*, c. 16, s. 75, he is not liable in assumption for his use and occupation for the portion of the half-year prior to the fiat.

A tenant under a parol agreement is within the protection of this section. *Slack v. Sharp*. 390

2. The damages arising from a breach of contract to accept goods at a certain price on a certain day, are not proveable under a commission of bankruptcy.

Contracts to deliver stock on a certain day, are an exception to this rule. *Green v. Bicknell*. 634

3. Section 127 of 6 Geo. 4, c. 16, which vests in his assignees all the future estate and effects of a bankrupt, who does not pay 15s. in the pound under his second commission, in his assignees, is retrospective.

In *assumpsit* to recover a sum of money, defendant pleaded that plaintiff had been twice a bankrupt, and that he had not paid 15s. in the pound under the second commission:—Held, on special demurrer, to be a good plea, as the 6 Geo. 4, c. 16, s. 127, had divested his estate in his assignees absolutely, and did not leave him a right of action subject to their interference. *Young v. Rushworth*. 585

### BATTERY.

Throwing water on a person is a battery. *Pursell v. Honne*. 564

### BEER.

See *QUO WARRANTO*, 1.

A conviction for keeping open a beer-house at times prohibited by the order of justices under 11 Geo. 4 and 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, is bad, if it omit to aver that the justices made such an order, and to state the particular time at which the beer-house was so kept open.

The seven days, which a party convicted under the above acts, has for paying a penalty imposed on him before a distress warrant can

issue, are to be reckoned one day inclusively and the other exclusively, and if the warrant is issued too soon, it is not bad because it was dated too soon. *Newman v. Earl Hardwicke*. 368

### BENEFICE.

Charge on.—See *CLERGYMAN*.

### BILLS AND NOTES.

The addition of a name as a second surety to a joint and several promissory note, after it has issued, but with consent of all the parties to it, is not a material alteration, so as to preclude the original surety, who has paid a moiety of it, from recovering the amount as money paid to the use of the maker. *Cattin v. Simpson*. 248

### BOND.

See *ACCORD AND SATISFACTION*.

### BRIDGE.

See *EVIDENCE*, V.

1. The owner of a bridge, resting on piles driven into the soil, one end of which was in the parish of A., and the other in the parish of B., in which parish was situated the toll-house, is rateable for an occupation of land in A. *pro rata*, although the road over the bridge was repaired by other persons.

Where tolls traverse of a bridge were let at a yearly rent, but not by deed:—Held, that no interest passed, and that the owner of the bridge was rateable in respect of his beneficial occupation thereof. *The Queen v. Marquis of Salisbury*. 476

2. Where there is a prescriptive liability to repair a bridge, it is an intendment of law, in the absence of any evidence to the contrary,

that the liability extends to 300 feet of the approaches at each end of the bridge. *The Queen v. Mayor &c. of Lincoln.* 273

### CERTIORARI.

1. A Court of Quarter Sessions having quashed an order of removal, and refused to state a case for the opinion of the Queen's Bench, a writ of certiorari was obtained to bring up their order. The clerk of the peace returned the orders and notices, and a statement of the facts relating to the appeal, by which it appeared that the notice of the grounds of appeal, sent under the 4 & 5 Will. 4, c. 76, s. 81, was defective. A rule having been obtained to quash the order of sessions, and to confirm the original order, the Court of Queen's Bench discharged the rule, as there was no precedent for such a course of practice. *The Queen v. Inhabitants of Abergele.* 406

2. An affidavit for a certiorari, to remove an inquisition taken to assess compensation under a railway act, should set out an exact copy of the inquisition, or account for the omission.

Such an affidavit should also distinctly set out particular facts, sufficient to raise a question of law and a presumption of error in the inquisition. An affidavit, therefore, which, after reciting that the inquisition stated certain lands were authorized to be taken under the act, added generally, "which deponent asserts is not the fact," is insufficient.

The following words in an affidavit, "and deponent further objects" that there was no notice, &c. are bad, as not amounting to a categorical allegation. *The Queen v. Manchester and Leeds Railway Company.* 439

### CHURCH.

1. Under the 59 Geo. 3, c. 134, s. 39, the commissioners for building new churches have the power of stopping up unnecessary paths in church-yards, on giving notice in the manner and form prescribed by the 55 Geo. 3, c. 68. The notice prescribed by that act states, that the order will be lodged at the next quarter sessions, and will then be confirmed and inrolled, unless upon an appeal against the same, to be then made, it be otherwise determined. The 59 Geo. 3, c. 134, contained no other enactment relating to an appeal:—Held, that although it appeared to be the intention of the legislature to give an appeal against the order of the commissioners, they had not carried that intention into effect. *The Queen v. Stock.* 420

### Rate.

2. *Jac.* 1, by letters-patent, granted the rectory of St. S. to certain persons and their heirs, in trust for the wardens of St. S., enjoining them, out of the revenue thereof, to maintain two chaplains, and to repair their parish church, and to pay the chaplains certain salaries. By a local act, reciting these letters-patent, and that the parish church was very chargeable, and the revenue did not extend to repair the church and allow any reasonable maintenance to the chaplains, it was enacted, that the inhabitants of St. S. should be discharged from tithes, and that in consideration thereof the wardens, with six of the inhabitants, might make a rate every year, and that the wardens should pay to the chaplains certain salaries, which should be in lieu of all salaries to be paid under the letters-patent, and all the residue of the rate to be applied to the repairs of the

church. A subsequent local act directed that the rate should be made by the wardens, overseers of the poor, and other inhabitants of the parish, in vestry assembled; and that out of the rate so collected the wardens should pay the salaries &c., and apply the remainder to the repairs of the church. The inhabitants having refused to make a rate under this act, and the salaries of the chaplains being unpaid, and the church out of repair, the Court directed a mandamus to the wardens and inhabitants to make a rate:—Held, that the rule was rightly directed, as the wardens had no power to make a rate alone.

The return of the inhabitants stated that the wardens were liable, on their covenant in the letters-patent, to pay portion of the salaries and to repair the church, and that they had sufficient yearly revenue for that purpose, the rate being only intended to be a rate in aid:—Held, that whatever might be their liability or their revenue, as to the church repairs, the acts of parliament give the rate to the chaplains as the only fund for payment of their salaries, and in lieu of all others. *The Queen v. The Wardens &c. of St. Saviour's, Southwark.*

126

## CHURCH BUILDING ACTS.

See VESTRY, 2.

## CLERGYMAN.

See CORPORATION, 9.

1. The defendant, who was a beneficed clergyman, granted, in 1813, an annuity, which he charged on his rectory of S., demising it for a term of years to a trustee. In 1825, this and other annuities, with the terms thereby created, were by deed transferred to the plaintiff on his advancing 4400*l.* to take them

up, and an annuity of 574*l.* 9*s.* granted him; the defendant, by the same deed, again demised his rectory of S., and also his vicarage of W., for a term, giving power to the plaintiff to sequester the rectory and vicarage respectively, if he should think fit. The deed also stated that the defendant had executed a warrant of attorney, of even date therewith, authorizing the plaintiff to enter up judgment for 8800*l.* (being double the sum advanced), which it was intended should be a collateral security only, and that no execution should issue unless the annuity was in arrear for twenty days. The warrant of attorney recited the deed, which stated the grant of the annuity of 1813, and of the other annuities, and the transfer of them to the plaintiff, and the grant of the annuity of 574*l.* 9*s.*, and "for the further securing of the regular payment of the said annuity or yearly sum of 574*l.* 9*s.*" &c., authorized judgment to be entered up against the defendant in the common form.

In 1832, the plaintiff brought an ejectment to recover the rectory of S., under the term granted in 1813, and in July, 1833, obtained possession. In June, 1833, the annuity being 861*l.* in arrear, the plaintiff sued out a *levari facias*, and sequestered the vicarage of W. A rule nisi having been obtained, in Trinity term, 1836, to set aside the warrant of attorney, on the ground of its being a charge on a benefice, and the sequestration, on the ground of its being kept in force to satisfy arrears subsequently accruing, all arrears due at the time of the sequestration issuing having been paid out of the proceeds of S.:—Held, that the warrant of attorney was not void, as it did not in terms charge the benefice; that the sequestra-

tion was valid, as the plaintiff was entitled to appropriate the profits of *S.* to the new arrears of the annuity, and to keep the sequestration on foot till the old arrears of 861*l.* were levied out of *W.*  
*Moore v. Ramsden.* 180

## CONSTRUCTION.

See COVENANT.

## CONTEMPT.

1. Where an arbitrator awarded, that in consideration of a certain sum, *S.* should forthwith, at the costs and charges of *T.*, surrender to him a copyhold estate, and *S.* was informed that, upon such surrender being made, she would be paid the said sum and costs:—Held, that she was bound to surrender in the first instance, and that she was in contempt for non-compliance with the award, although such sum and costs had not been paid.  
*Doe d. Clarke v. Stilwell.* 701

## COPYHOLD.

See ESTATE, 2, 3.

## CORPORATION.

See PLEADING, 1.—QUO WARRANTO.

1. The returning officer, at an election of councillors, under the 5 & 6 *Will.* 4, c. 76, has merely the ministerial duty to perform of returning the candidates who have the actual majority of votes, without reference to their possessing or not, in his judgment, the proper qualification: and where, to a quo warranto for exercising the office of councillor, the defendant pleaded that he was duly elected, and issue was joined thereon, it was held sufficient for the relator to prove at the trial that other candidates had the actual majority, without proving their qualification.

The voting papers given in at the election of councillors, which by section 35 the mayor is to cause to be kept in the town clerk's office for six months after the election, are not such public documents as to prove themselves on production from the proper custody. Where, therefore, such papers having been handed over by the mayor to the town clerk, were by his clerk delivered over to the clerk of the succeeding town clerk, who produced them at the trial: it was held, that the former town clerk also should have been called to prove that the papers transmitted by him were the same which he had received from the mayor.

*Quare.* In quo warranto to inquire into the validity of the election of councillors, can the title of the burgesses who voted, and whose names are on the burgess roll, be gone into? *The Queen v. Ledgard.* 513

2. On the 20th July, 1836, at a meeting of the town council of a borough, a resolution was passed that *S.* should be elected town clerk. This office had usually been held in conjunction with that of clerk of the peace, and at an entire salary, and *S.* deposed to his belief that he was elected to both offices; but at this time the old borough sessions having been abolished on the 1st of May preceding by the Municipal Corporation Act, and no new grant of sessions having issued, the office of clerk of the peace did not exist. On the 25th July following the council again met, and in the absence of one of the members, who had been present on the previous occasion, rescinded their prior resolution, and elected defendant town clerk, before security had been taken from *S.* for the due execution of his office under the

58th section of the Act, and before any official intimation to him of his appointment. On the 15th August in the same year, a Court of Quarter Sessions was granted to the borough, and defendant was then elected clerk of the peace also. A rule nisi for a quo warranto having been obtained against him, on the ground that he had not been duly elected to either office, that S. had been elected and had never been legally removed, and that both offices were full at the time of the supposed election of the defendant; the Court discharged it with costs, and held that there had been a good removal of S. from the office of town clerk, and that he could not set up want of notice of the meeting of the 25th July, no such objection appearing in either the rule or the affidavits.

*Quere*, whether it was requisite that there should have been notice of the meeting, which was an adjourned quarterly meeting, and a summons to the members of the town council to attend? *The Queen v. Thomas*. 288

3. The defendant's title to the office of alderman was questioned by quo warranto, on the ground that, although he had a majority of votes, the full number of aldermen for the borough, at the first election after the passing of the 5 & 6 Will. 4, c. 76, had not been elected, and that therefore his election was void. On demurrer to a replication setting out the above circumstances to shew the defect in defendant's title, the Court held, that the defect, if any, was cured by the 1 Vict. c. 78, s. 2, and gave judgment for him.

Held, also, that the prosecutor was not entitled to costs under section 20, as no application to discontinue the proceedings al-

ready commenced had been made immediately after the passing of the act. *The Queen v. W. L. Roberts*. 295

4. Previous to the annual election of councillors in November, in a borough divided into wards, the mayor published a notice, purporting to be made with the concurrence of the aldermen and assessors, to the effect that two vacancies were to be filled up, one in the room of A. B., going out by rotation, and one in the room of C. D., who had been declared a bankrupt. The council had not declared the office of C. D. to be void, or given any notice thereof. At the election, 250 burgesses voted for two candidates jointly, and 120 voted for a third singly:—Held, that the votes given for the two candidates were thrown away, and that the third candidate, to whom 120 votes were given, was duly elected. *The Queen v. The Mayor and Corporation of Leeds*. 145

5. *Seemle*, the votes given at a municipal election, for a candidate rendered ineligible by the express words of an act of parliament, in consequence of his holding another office in the same corporation, are not thrown away, unless express notice of the ineligibility has been given to the voters. At an annual election of councillors in one of the wards of a borough divided into two wards, a majority of votes was declared in favour of a candidate who was an assessor for the other ward. No notice of ineligibility of this candidate had been given, but the mayor rejected his name from the list published by him, pursuant to section 35 of the Municipal Corporation Act, and inserted the name of a candidate having a minority of votes, who accepted the office. The Court granted a quo warranto against

- the latter candidate. *The Queen v. Hiorns.* 148
6. A party elected to a corporate office has a right to be admitted previously to making the declaration required by the 9 *Geo. 4*, c. 17, s. 2, to be made "within one calendar month next before or upon his admission." *Rex v. Humphery.* 681
7. Where a quo warranto information has been brought against a municipal officer for a defect in his election, cured by 7 *Will. 4 & 1 Vict.* c. 78, s. 2, application to discontinue should have been made immediately after the passing of that act, in order to entitle the relator to his costs. *The Queen v. W. Roberts.* 592
8. Under section 92 of the Municipal Corporation Act, which gives an appeal against the borough-rate, and empowers the recorder to hear and determine the same as in the case of an appeal against any county rate, notice of the appeal to the town clerk is sufficient, as he is the officer of the town council who made the rate. *The Queen v. The Recorder of the Borough of Carmarthen.* 19
9. The corporation of Liverpool, in compliance with certain local acts, built a church, and appointed a person to officiate therein by the name of "minister." They also, of their own accord, and independently of these acts, appointed a clergyman as "lecturer" to assist him in the general duties of his office. The lecturer having been removed, after receiving a regular stipend for more than seven years before the passing of the 5 & 6 *Will. 4*, c. 76, claimed compensation for the loss of his office as "minister" under section 68:—Held, that the word "minister" was to be interpreted liberally, and without reference to the way in which it was used in the local

acts, and that the claimant was entitled to compensation. *The Queen v. Mayor, &c. of Liverpool.* 280

10. In 1794 the corporation of Bath appointed *A. B.* assistant chamberlain of the city for a year at a yearly salary. In 1804 the salary of *A. B.* was raised. In 1810 *C. D.* was appointed assistant chamberlain by the chamberlain, and he continued to hold this office till the passing of the Municipal Corporation Act. In 1827 the corporation had again raised the salary. On the passing of the Municipal Corporation Act, the office of *C. D.* was abolished, and a claim having been made by him for compensation, the Lords of the Treasury awarded that his office was not the subject of compensation within the 66th section of the act; and the Court of Queen's Bench confirmed their decision. *Ex parte Harcey.* 159
11. In the borough of *P.* a local act empowered the mayor and corporation to appoint certain officers (amongst them a quay master), and also to displace them from time to time, and to assign them salaries out of the wharfage dues collected under the act. The remainder of the dues collected was appropriated by the act to the harbour of *P.* The town council elected under the 5 & 6 *Will. 4*, c. 76, who by section 72 are made trustees for executing all acts relating to the borough, having displaced a quay master appointed before the Municipal Act:—Held, that he was displaced under the local act, and therefore was not entitled to compensation as an officer displaced under the Municipal Act.

*Quære*, whether the office of quay master, the salary of which arose from the dues collected under the local act, is a borough

- office? *The Queen v. Mayor, &c. of Poole.* 119
12. Where the Lords of the Treasury award compensation to an officer in a borough, on his being removed from office by the town council, if the office is not a borough office, or the removal is not made under the 5 & 6 Will. 4, c. 75, the Lords of the Treasury have no jurisdiction. *The Queen v. Mayor, &c. of Poole.* 119
13. The minutes of a meeting of town council ought to be drawn up and signed by the chairman at the time of the meeting, under s. 69 of 5 & 6 Will. 4, c. 76. *The Queen v. The Mayor and Town Council of Evesham.* 351
14. The duty of appointing inspectors of weights and measures &c., under 5 & 6 Will. 4, c. 63, has, by the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, devolved upon recorders of boroughs. *The Queen v. Recorder of Hull.* 595

### COSTS.

See CORPORATION, 3, 7—CRIMINAL LAW, 1—MANDAMUS, 3.

1. The New Rules, 4 Will. 4, c. 7, have not repealed the 4th Anne, c. 16, s. 5, as to double pleading. Where, therefore, to an action of assumpsit, on the warranty of a horse, the defendant pleaded—1, non assumpsit; 2, that the horse was sound: and a verdict having been found for him on the first plea, and against him on the second, the judge who tried the cause certified that he had probable cause for pleading the second plea,—he was held to be exempted by the statute from paying any costs in respect of it. *Robinson v. Messenger.* 583
2. Trespass for breaking and entering a dwelling-house. Pleas—1, not guilty; 2, that the message

was not the message of the plaintiff; 3, liberum tenementum. Replication, that the defendant had demised to the plaintiff, and broke and entered during the demise. The plaintiff obtained a verdict, with 1*l.* damages, and the judge certified under the 43 Eliz. c. 9:—Held, that the plaintiff was entitled to full costs notwithstanding. *Thomas v. Davies.* 567

3. Where a declaration charged the defendant with assaulting the plaintiff, and throwing water upon him, and also with wetting, damaging, and spoiling his clothes, and the defendant pleaded, as to the assaulting and wetting, damaging and spoiling the clothes, a justification, and to the residue of the trespasses, not guilty:—Held, as the wetting of the clothes was not necessarily a battery, that there was no justification of the battery; so that the judge who tried the cause might have certified, under 22 & 23 Car. 2, c. 9, that the battery was proved, and that, as he had not done so, the plaintiff, who recovered less than 40*s.* damages, was not entitled to costs. *Pursell v. Horne.* 564
4. Where, to an action of libel, there are pleas of not guilty, and a justification, and the defendant gives no evidence of justification, but obtains a verdict on the general issue, the plaintiff is entitled to a verdict and his costs on the plea of justification. *Empson v. Fairfax and another.* 385
5. If a defendant puts in special bail, without being actually arrested, he is not entitled to costs under the 43 Geo. 3, c. 46, s. 3. *James v. Askew.* 495

### COVENANT.

See PAYMENT INTO COURT.

1. Declaration in covenant stated

that the plaintiff, by indenture dated the 21st March, 1828, demised certain premises, from the 25th March then instant, for and during the term of seven years then next ensuing, wanting seven days, to the defendant, yielding and paying therefore yearly and every year, during said term, the yearly rent of 285*l.*, by four equal quarterly payments, on the 25th March, the 24th June, the 29th September, and the 25th December, in every year, *commencing from said 25th March then instant*, and that defendant covenanted to pay rent accordingly, but that in breach thereof, in the last year of the said term, he had only paid half of the rent, and that on the 25th March, 1835, there was due 140*l.* for two quarterly payments. The defendant pleaded payment into Court of the first quarter, and demurred generally to the insufficiency of the alleged breach of covenant, in respect of the last quarterly payment, on the ground that it appeared on the face of the declaration that the second quarter's rent, mentioned in the breach, did not become due "during the term," as stipulated in the covenant. The Court gave judgment for the plaintiff, construing the covenant to be for payment of a beforehand rent, the first quarter being payable on the 25th March, 1828, the day of the commencement of the term, so that the whole rent was payable within the term. *Hopkins v. Helmore.* 453

2. *A.*, by a voluntary conveyance, covenanted that his executors should invest a certain sum in the three per cents., in the corporate name of the vicar of H., in the corporate names of the churchwardens of H., and in the corporate name of the archdeacon of C., in trust to pay 10*l.* per annum to the parish school, and the remain-

der in charities. In an action on the covenant against the executors:—Held, on demurrer, that there was nothing contrary to law in the covenant, nor did it appear to be impossible to be performed, although it may be questionable whether churchwardens are corporations, except for particular parochial purposes.

*Quære*, if a party covenants to do an impossible act, whether he is not liable in damages for his breach of covenant? *Tufnell, clerk, v. Constable and Bailey, executors.*

47

### CRIMINAL LAW.

1. An indictment for an indecent exposure of the person before one *J. S.* with the intent to provoke him to commit an unnatural crime, is not within s. 23 of 7 *Geo.* 4, c. 64, so as to enable the Court before whom it is tried to grant the costs of the prosecution. *The Queen v. —.* 627
2. An indictment for obtaining goods by false pretences must state to whom the goods belonged, and if it do not, it will not be cured by verdict, under 7 *Geo.* 4, c. 64, s. 21. *Martin v. The Queen.* 472

### DEED.

See EVIDENCE, IV. 1, VI.

### DEVISE.

See STATUTE OF FRAUDS.

1. A devise is sufficiently signed within the 5th section of the Statute of Frauds, by the devisor putting his mark, instead of his signing his name to it, although he was an educated person, and able to write well. *Taylor v. Dening.* 228
2. Devise of freehold lands (before 7 *Will.* 4 & 1 *Vict.* c. 26, s. 29) to trustees, and the survivors and

survivor of them, and the heirs of such survivor (subject to an annuity of *J. D. H.* and her assigns, payable by such trustees; and also to so much of the deviser's just debts, legacies, &c. as the residue of his personal estate should not extend unto), upon trust to receive the rents, issues, and profits, and pay them to the deviser's wife during her life, continuing his widow; and from and after her death and marriage, "upon trust to apply the said rents, issues, and profits towards the maintenance and support of my daughter *Isabella*, until she shall attain the age of twenty-five years; and from and after her attaining that age, "then upon trust as to my real estate, subject and charged as aforesaid, for my said daughter *Isabella*, her heirs and assigns for ever. But in case it should happen that my said daughter *Isabella* depart this life without leaving issue lawfully begotten," then to *W. H.* and *J. D. H.*, their heirs and assigns for ever, as tenants in common. The deviser also gave a power to the trustees, in order to raise money for payment of debts &c., to sell in fee any part of the premises devised.

The deviser's wife died during his life-time.

The trustees sold part of the real estates for payment of the deviser's debts. *Isabella*, after his death, suffered a recovery, "in order to bar and extinguish all her estates tail in the said hereditaments." She afterwards died under twenty-five, without leaving any issue of her body:—Held, that *Isabella* took an equitable estate tail under his devise.

That the estate tail of *Isabella* was vested on the death of the deviser.

That the trustees took a legal fee simple in the whole of the

lands comprised in the devise, for the purposes of their trusts; that the recovery suffered by *Isabella* was, therefore, an equitable recovery, and that the remainder, dependant upon the estate tail, devised to *W. H.* and *J. D. H.*, being for the same reason an equitable remainder, was barred by the recovery. *Doe d. Cadogan v. Ewart.*

197

### DISTRESS.

Distrainers are bound to see that the pound to which they take the distress is in a fit state to receive it, and therefore if, from the state of the weather, the pound is in a wet and muddy state, the distrainers are liable for any damage thereby caused to the distress. *Wilder v. Speer and others.*

536

### DRAMATIC PERFORMANCES.

See THEATRES.

### EJECTMENT.

See ARBITRATION.

### ELECTION.

See CORPORATION, 1, 4, 5—VESTRY, 1.

### ESTATE.

See DEVISE.

Tenant for life and tenant in remainder of a copyhold suffered a recovery, and declared uses on the surrender, which, as a voluntary conveyance, was void as against a purchaser; but the Court held that the recovery itself was not therefore void, but that it operated so as to give them the fee by way of resulting use.

*A.*, tenant for life of a copyhold, and *B.* his daughter, who had five children living, being tenant in tail

in remainder, joined in a recovery in 1778, and, in alleged pursuance of his marriage articles, *A.* surrendered to the use of himself for life, remainder to the use of *B.* for life, remainder to the right heirs of the survivor: *A.* and *B.*, within two or three weeks of the surrender, conveyed the fee to a bonâ fide purchaser. The contingent remainder terminated in favour of *B.*, in 1802, and in 1835 she died. *B.*'s son thereupon brought ejectment against the purchaser, who had been in possession since 1778, on the ground that a contingent remainder having been created, it could not pass by the surrender of 1778:—Held, first, that as no contract with *A.* appeared on the face of the transaction, and the settlement was not made with a view to the interests of *B.*'s son, the Court would not infer that a contract actually existed that *A.* should join in the recovery, on the consideration of having a contingent remainder in the fee limited to himself, and therefore that the uses were void, under the 27 *Eliz.* c. 4, against a bonâ fide purchaser; second, that as the surrender passed *B.*'s life estate, the claim to the fee did not accrue till her death, in 1835.

An heir, on whom a contingent remainder in a copyhold has devolved, may bring ejectment before admittance. *Doe d. Baverstock v. Ralfe.* 648

### EVIDENCE.

See HIGHWAY, 2—INSOLVENT, 1—LIMITATIONS, STATUTE OF—MASTER AND SERVANT, 2—PAYMENT INTO COURT—PLEADING, III. 1—PRESCRIPTION, 1.

I. *Onus Probandi.*

See ALTERATION.

1. In ejectment for not insuring ac-

cording to covenant, it lies upon the plaintiff to prove that no insurance has been effected, and the circumstance that defendant refused to shew the policy, when the plaintiff required him, and the non-production of it at the trial, after notice, are not *primâ facie* evidence against him.

*Semble*, per *Littledale J.*, that if it had been an action of covenant merely, the onus would have been cast on the defendant. *Doe d. Bridger v. Whitehead.* 557

### II. *Competency of Witnesses.*

1. The estate of a deceased is always liable for the reasonable expenses of his funeral, and can in no event be liable beyond them. Therefore a residuary legatee is not incompetent to prove that his testator's funeral, which exceeded the cost chargeable upon the estate, was furnished to the order of a stranger, on the ground that the tendency of his evidence is to relieve the estate. *Green v. Salmon.* 388
2. A rated inhabitant is made a competent witness for his parish by 54 *Geo. 3.* c. 170, s. 9, in ejectment to recover parish property. *Doe d. Boulton v. Adderley.* 629  
*Doe d. Bachelor v. Bowles.* 633  
See *post*, IV.

3. In covenant for rent and non-repair, the husband of a person, to whose separate use, with remainder to their children, an annuity is settled and charged upon the premises in question, is a competent witness for the plaintiff. *Abercrombie v. Hickman.* 676

### III. *Examination of Witnesses.*

1. When a statement made by a party to a suit, in giving evidence on a former trial, has been got out in cross-examination, only so much of the remainder of the evidence is allowed to be given on re-exami-

nation as tends to qualify or explain the statement made on cross-examination. *Prince v. Samo.* 139

#### IV. Admission.

See PRACTICE, 1.

1. In an ejectment with two demises, one by a trustee in fee, and the other by a *cestui que trust* for life, the question was, as to parcel or no parcel. No evidence was offered on the demise by the *cestui que trust*, but the defendant tendered in evidence a deed by the *cestui que trust*, who had been in possession, as an admission by a party substantially interested in the suit:—Held, that as the deed was not clearly and unambiguously against the interest of *cestui que trust*, and as it appeared by it that she obtained an advantage under the deed, there was a balance of interests, and her declaration was inadmissible.

*Quære*, whether the admission of a *cestui que trust*, whose interest is not commensurate with his trustees, is evidence against the trustee in an action brought by him respecting the trust property? *Doe d. Williams v. Wainwright.* 598

2. Declaration, that by indenture, reciting that by a prior deed the plaintiff had been appointed trustee of a company thereby established, the defendant covenanted to indemnify the plaintiff, on retiring from the trusteeship, from all liability attached to him as such trustee, and that a liability had so attached, from which the defendant had refused to indemnify him. Plea: that the liability in question was incurred by the plaintiff as shareholder, and not as trustee:—Held, that the admission in the plea of the trust deed so referred to in the recital, did not dispense with the production of the deed in evidence, in order to shew the na-

ture of the trusts created by it. *Gillett v. Abbott.* 24

#### V. Public Writings.

1. On an indictment for the non-repair of a bridge *ratione tenuræ*, held that a record of 18 *Edw.* 3, setting out a presentment of the Bishop of Lincoln for non-repair of the bridge, and his acquittal by the jury, which was shortly after followed by a grant of pontage from the crown, on the ground that it had been found by inquest that no one was liable to repair the bridge, was admissible in evidence to negative any immemorial liability *ratione tenuræ*. The jury, after finding a verdict of acquittal, also found that the bridge had been recently built, and that no one was liable to repair it. *Semble*, that such finding by a jury, in ancient times, is admissible as reputation, on a question as to the liability to repair *ratione tenuræ*. *The Queen v. Sutton.* 569
2. To prove the extent and rights of a manor, which had formerly been parcel of the duchy of Lancaster, a document produced from the duchy office was tendered in evidence, purporting to be a survey of the manor, made in the 33 *Edz.*, while the manor belonged to the duchy, by the deputy surveyor of the duchy, founded on the presentment of the tenants of the manor, at a court of survey, and it appeared that Queen *Elizabeth* had paid the expenses of the survey:—Held, to be inadmissible either as to a document made under public authority, or as evidence of reputation. *Evans v. Taylor.* 174
3. Where the crown granted to S. the castle and honor of H., and "all that toll and all those tolls called 'traverse,' to be taken in manner accustomed, i.e. of all saleable things passing through the town of H., and also through the

towns of Ware, B., T., and elsewhere, in divers places in the same county;" and it appeared that a toll had always been taken at Ware Bridge, and that in various ancient documents it had been described as the traverse and the toll traverse of the bridge of W., and that S. and his ancestors, for twenty years past, had repaired the bridge:—Held, that the burden was cast upon S. to shew that the toll was a toll thorough, and not traverse, although the bridge was a public highway; and that the sessions, in the absence of any such evidence, were warranted in inferring that it was a toll traverse. *The Queen v. The Marquis of Salisbury.* 476

4. In the 13 Car. 1, a commission issued out of the duchy court of Lancaster, reciting that the lords of the manors of A. and C. had petitioned the crown, shewing that the boundaries between their two manors were uncertain, and that suits were likely to grow thereout, for prevention thereof it directed the commissioners to repair to the spot and impanel a jury, for the purpose of setting out the boundaries. The return stated that the commissioners had inquired into the matter, being attended by the parties interested, and that a jury of the body of the county had been sworn to inquire and true verdict give concerning the boundary, and thereupon the commissioners set out the boundary by marks and stones:—Held, that this was a proceeding in the nature of a verdict before a court of competent jurisdiction, and therefore admissible in a question of manorial boundary, where reputation was admissible, and that it was not to be excluded on the ground that it had taken place post litem motam, or because it did not appear decree had been made. *Briaco v. Lomas.* 308

5. Entries made by a medical officer,

in a book which he is directed to keep, by a rule under the hands and seal of the Poor Law Commissioners, of his visits to sick paupers, are not admissible in evidence for him, as a public writing, to prove that he paid such visits. *Merrick v. Wakley.* 284

#### VI. *Private Writings.*

1. Where a mortgagee proved his title under a conveyance in fee in 1821, a prior deed, above thirty years old, by which the estate in question was settled by the mortgagor on himself for life, remainder to his son, found among the papers of the mortgagor, after his death, is admissible in evidence without proof of execution. The rule as to the proof of custody which entitles ancient deeds to be so read, is satisfied by proof of their coming out of the possession of any one so connected with them as not to raise any suspicion of fraud. *Doc d. Neale v. Samples.* 254

#### VII. *Reputation.*

See *ante*, V.

1. On an issue as to a right of way, a document upwards of forty years old was produced, signed by thirteen inhabitants of a hamlet, twelve of whom were dead, which appeared to have been drawn up at a public meeting, called to resist the repairs of the road being thrown upon the hamlet. The document contained a declaration, that the locus in quo was not a public road:—Held, that it was admissible as evidence of reputation. *Barraclough v. Johnson.* 233

#### VIII. *Evidence in particular Cases.*

1. On an issue as to the boundary between manors A. and B., it is competent to prove what the boundary is between manors A. and C., where the nature of the latter

boundary between a ridge of hills renders it probable that the same line is continued on as the boundary between the contending manors. *Brisco v. Lomax.* 300

And see *post*, X.

2. Where the plaintiff, in trespass to goods, claimed under a sale from the sheriff, the defendant, under a plea that the goods are not the plaintiff's, may shew that the sale was fraudulent, and that the defendant had himself subsequently seized the goods in execution. *Ashby v. Minnett and others.* 231
3. An affidavit that the defendant did print and insert a libel in a certain newspaper, called *The Standard*, a copy of which is annexed, is not sufficient proof of publication, so as to furnish ground for a criminal information. *The Queen v. Baldwin.* 342
4. Where an award purported to be published on a certain day, in the presence of an attesting witness, an affidavit by him that it was published in his presence, but not stating when, is evidence of publication on the day in question. *Doe d. Clarke v. Stilwell.* 701

#### IX. Evidence to apply Language of a Deed.

1. Where the issue between purchasers of two lots at a sale, was as to parcel or no parcel, a hand-bill, describing the lots in question, which was circulated in the auction-room at the time of the sale, is admissible in evidence, in order to apply the language in the deed of conveyance, which described the premises as those now in the occupation of *A. B.*, with all buildings &c., known or reputed to be parcel thereof. *Murley v. M'Durmott.* 356

#### X. Unstamped Instrument.

1. When fraud has been committed by giving a cheque on a banker,

which the party knows will not be honoured, the cheque may be given in evidence, to prove the fraud, though otherwise inadmissible for want of a stamp.

The same evidence is admissible in a civil action, to prove a fraud committed by a third party, as if he himself were indicted for such fraud, with the exception of his admissions subsequent to the transaction. Therefore in an action for money had and received, where it was necessary for the plaintiff to prove that his property had been obtained from him fraudulently, by means of the cheque of a third party:—Held, that the cheque, though unstamped, was admissible in evidence against the defendant, who was no party to the fraud. *Keable v. Paync.* 531

#### XI. Secondary Evidence.

1. Where an instrument is proved by a copy, as secondary evidence, from which it appears that there was an attesting witness to the original, it is not necessary to call him. *Poole v. Warren.* 693

#### EXECUTION.

The plaintiff obtained a judgment for 23*l.*, damages and costs, and issued a writ of *fi. fa.*, indorsed to levy 24*l.*, including 1*l.* for the costs of the writ. Whilst this writ was in the hands of the sheriff unexecuted, the defendant tendered 23*l.* for the debt and costs, but the plaintiff refused to receive it, unless the defendant paid the 1*l.* for the writ:—Held, that the tender was insufficient, and that the plaintiff was entitled to the costs of the writ of *fi. fa.* under the 43 *Geo. 3.* c. 46. *Bayley v. Potts.* 365

#### EXECUTOR.

See ADMINISTRATOR.

**FENCES.**

See **PRESCRIPTION**, 2.

**FORFEITURE.**

See **EVIDENCE**, I.

**FRAUD.**

*Fraudulent Indentures of Apprenticeship, Effect of.*

See **POOR**, IV. 2.

**FRAUDS, STATUTE OF.**

See **DEVISE—PLEADING**, III. 4.

1. A representation by the defendant that money might be safely lent to *A. B.*, because the title-deeds to an estate, which *A. B.* had just bought, were in defendant's possession, and that nothing could be done without the knowledge of the defendant, and that plaintiff would be safe in making the loan, is a representation as to the *ability* of *A. B.* within the 9 *Geo. 4*, c. 14, s. 6. *Swan v. Phillips.* 447

**FREEMAN.**

See **QUO WARRANTO**, 2.

**FRIENDLY SOCIETY.**

1. *Scoble*, that a Friendly Society, whose rules had been originally inrolled, but which had adopted and acted on new rules for a number of years without having them inrolled, ceased to be within the protection of the 33 *Geo. 3*, c. 54.

The Court refused to issue a mandamus to justices to hear the complaint of a member of a Friendly Society, which had been acting on rules not inrolled for upwards of thirty years, on the doubt it entertained as to the existence of the society in such a case, al-

VOL. III.

though the original inrolled rules had never been repealed. *The Queen v. Lord Godolphin.* 488

**GAME.**

*Statute.*

1. An information under 1 & 2 *Will. 4*, c. 32, s. 30, for trespassing in pursuit of game, may be laid by any person, although he has no interest in the land trespassed on. *Middleton v. Gale and others.* 372

**HIGHWAY.**

See **EVIDENCE**, VII.

1. Where a road had been presented by a magistrate under 13 *Geo. 3*, c. 78, s. 24, and the presentment was removed into the Queen's Bench by certiorari, and after trial, but before judgment, that statute was repealed by the 5 & 6 *Will. 4*, c. 50, s. 1:—Held, that the Court could not give judgment for the crown, as the proceedings were founded on the presentment, which was no longer valid.

*Quære*, whether, in a plea by the inhabitants of a parish, indicted for the non-repair of a road, that *A. B.* is liable to repair *ratione clausuræ*, it is sufficient to aver that the inclosure was made whilst *A. B.* was in occupation of the adjoining lands? *The Queen v. Inhabitants of Mawgan in Meneage.* 502

2. A road had been used by the public without interruption for about thirty years, but it appeared that in 1814, twenty-two years before the action commenced, an agreement was made by the owner of the soil on one side, and a company and the surveyor of highways of the hamlet and others, on the other side, by which the owner agreed to let them use the road on the company paying 5s. a year,

and finding cinders, and the hamlet leading and spreading them:—Held, that although the evidence of user per se would shew a dedication by the owner of the soil, it was explained by the agreement of 1814, and that the agreement only amounted to a licence to use the road, during such times as the conditions in it should be observed.

*Quære*, whether there can be a conditional dedication of a right of way to the public? *Barraclough v. Johnson*. 233

### INFORMATION.

See BEER AND GAME.

### INSOLVENT.

See OUTLAWRY.

1. The assignment of an insolvent debtor's estate and effects to the creditors' assignee, under 7 *Geo. 4*, c. 57, s. 19, by the provisional assignee, according to the form pointed out by sect. 11, for the assignment by the prisoner to the provisional assignee, is valid.

The 11 *Geo. 4* and 1 *Will. 4*, c. 38, s. 7, recites, that doubts had existed as to the validity of the assignment from the provisional assignee to the creditors' assignee, and enacts that such assignment, if made in obedience to the order of Court, shall be deemed valid. At a trial, where the validity of the assignment from the provisional assignee was in question, a copy of the counterpart of the assignment from the provisional assignee, filed of record, was produced, sealed with the seal of the Insolvent Debtors' Court; which assignment recited that it was made by the order of the Court, and two orders of the Court were also produced, removing the assignees to whom the provisional assignee had assigned, and appointing others:—

Held, upon this evidence, per *Coleridge J.*, that there was sufficient evidence to assume that the provisional assignee had made the assignment in obedience to the order of the Court: *sed quære*, per Lord *Denman C. J.*, *Littledale* and *Williams Js.* *Doe d. Broughton v. Story*. 106

2. Under the Insolvent Act, 1 *Geo. 4*, c. 119, s. 14, (unrepealed as to assignments made in pursuance of it) if the commissioners, on the death of an insolvent's assignee, do not appoint another, the insolvent's estate vests in the executor of the deceased assignee. *Abercrombie v. Hickman*. 676
3. A deed of assignment by an insolvent of all his effects, for the benefit of his creditors, executed during his imprisonment, without consideration and without pressure from any creditor, is voluntary, and void under the 7 *Geo. 4*, c. 57, s. 32. *Binns v. Towsey*, 88

### INSURANCE.

See EVIDENCE, I.

### JUSTICES.

See ORDER.

### LANDLORD AND TENANT.

See BANKRUPT, 1.—EVIDENCE, I.—PLEADING, III. 4.

A joint authority given by mortgagor and mortgagee of premises to a person to be the receiver, agent, and attorney of the mortgagors, to receive the rents until satisfaction of the mortgage, to bring actions in case of non-payment of rent, to give notices to quit, to bring ejectment in case of non-compliance, &c., as fully as the mortgagors might have done, is a sufficient authority to him to demand possession of tenants, under 4 *Geo. 2*, c.

28, s. 1, so as to make them liable in double value for holding over.  
*Poole v. Warren.* 693

### LIMITATIONS, STATUTE OF.

The defendant, on application for payment of a debt, handed over to the plaintiff certain book-debts due to himself, with the following acknowledgment in writing:—"I give the above accounts to you, so you must collect them, and you and me will be clear."—Held, that this was no bar to the Statute of Limitations, for, though an acknowledgment of the debt, no general promise to pay could be inferred from it, but merely a promise to pay in one particular manner.

*Scmble. Per Patteson J.* A promise to pay may be inferred from a general acknowledgment. *Routledge v. Ramsay.* 319

### MANDAMUS.

See FRIENDLY SOCIETY—QUO WARRANTO, 3.

1. The Court refused a mandamus to a board of guardians to admit a person as their clerk, who complained that the person filling the office had been unduly elected, by the votes of guardians who were themselves not properly elected. *The Queen v. The Guardians of the Dolgelly Union.* 542
2. If the return to a writ of mandamus be not void on the face of it, its validity must be regularly discussed on a concilium, and the Court will not order the return to be taken off the file, on the ground of its being a contempt of Court, as disclosed by affidavits. *The Queen v. Payn.* 165
3. Where the return to a mandamus is not frivolous on the face of it, its validity must be argued on a

concilium, and not on a rule for quashing the return.

The Court, in the exercise of their discretion on the Mandamus Act (1 Will. 4, c. 21), will grant costs to the prosecutors, although there may have been doubtful questions of law raised on the return.

Where a return to a mandamus, shewing cause for disobedience to the writ, is made by the inhabitants of a parish, if the return is quashed, the Court, in granting costs, will ascertain which of the inhabitants joined in making the return, and make the rule for costs absolute against them. *Reg. v. The Wardens &c. of St. Saviour's, Southwark.* 126

### MASTER AND SERVANT.

1. The defendants, who were occupiers of a bonded warehouse, engaged a master porter to lower and convey a barrel of flour from their warehouse. The master porter engaged a master carter, and both of them attended with their men. During the process of lowering it from the warehouse the barrel fell and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter. The defendants were held to be liable. *Randelson v. Murray.* 239
2. To trespass for taking the plaintiff's horse, the defendant pleaded, first, not guilty; and, secondly, that the horse was damage feasant on his land. The horse was proved to have been wrongfully distrained by the servant of the defendant on the highway, and not on his land:—Held, that no *prima facie* case was made out that the defendant had authorized the distress in question, by proof that he had on other occasions authorized his servant to distrain cattle damage feasant on his land; and that he had

not adopted the act of his servant by pleading a justification of it.  
*Lyons v. Martin.* 509

## MONEY HAD AND RECEIVED.

When it may be maintained.—See PLEADING, I, 2.

## NEW RULES.

*Several Pleas, when allowed.*

See PLEADING, III, 2.

*What must be pleaded specially.*

See PLEADING, III, 1—EVIDENCE, VIII, 2.

*As to Costs, where several Picas.*

See COSTS, 1, 4.

New Rule in the Queen's Bench. 2

## ORDER.

1. An order of two justices of the county of K., after reciting that upon application by the churchwardens and overseers of the parish of M., in the county of K., to have an order made on *T. G.* of the parish of M., in the same county, to maintain his father, and that the said *T. G.* had appeared, adjudicated that the father was unable to support himself; and that the said *T. G.* was a person of sufficient ability &c., and then proceeded to order that the said *T. G.* should pay a weekly sum:—Held, per *Patteson* and *Coleridge* Js. (*Littledale J.* dubitante), that it sufficiently appeared that *T. G.* was dwelling within the jurisdiction of the justices, as the words "of the parish of M." used by the churchwardens, signified that he dwelt there, and the justices had adopted those words, and so adjudicated that he there dwelt by making their order upon "the said

*T. G."* *The Queen v. Toke and another.* 323

2. In an action for false imprisonment, against a justice of the peace, a special verdict found, that at a hearing before two magistrates, at which the plaintiff was summoned, two paper writings were made, signed and sealed by them, by the first of which he was adjudged to be the reputed father of a bastard child, and ordered to pay the expenses of the lying-in and order, and 1s. 6d. a week to the parish of B., so long as the child was chargeable; and *S. A.*, the mother of the child, was ordered to pay 1s. a week, in case she should not nurse the child herself. The second paper writing was exactly the same, except that *S. A.* was ordered to pay the 1s. 6d. a week, and not the plaintiff, the name of *S. A.* being inserted by mistake for the plaintiff's, and the justices believing that one order was a copy of the other. The justices also told the plaintiff at the time, that he was to pay 1s. 6d. a week. When the two orders were made, they were delivered to the parish officers of B., according to the usual practice of the county, and they delivered the second-mentioned instrument to the plaintiff, and kept the first themselves. On a demand of the arrears of 1s. 6d. a week, the plaintiff refused to pay, on the ground that the order delivered to him was not a good order. On a summons before the defendant, the parish officers of B. produced the order delivered to them; upon which the defendant committed the plaintiff to gaol for three months, in default of his paying the arrears:—Held, that the order upon which the defendant issued his warrant was a valid order; that the defendant was not bound to go into the inquiry, whether another order was

made upon another person, a valid order being produced before him; and per *Littledale J.*, that if two orders were made by mistake at the sitting of the magistrates, it was competent to them at the time to declare which was the right one.

A justice is liable in trespass, if he commit a person for disobedience to an order which turns out to be invalid. *Wilkins v. Hemsworth, Esq.* 55

### OUTLAWRY.

1. A prisoner in the Insolvent Debtors' Court under outlawry for non-payment of damages and costs, may petition for his discharge without previous reversal of his outlawry. *The Queen v. The Commissioners of Insolvent Debtors' Court.* 543

### PARISH.

See *POOR*, I. II.

### PAWNBROKER.

1. *Quære*, where the exact sum due to a pawnbroker for interest, would involve a fractional part of a farthing, is he entitled to the farthing?

Where the sum payable to a pawnbroker for interest on a loan for a month, at the rate of 20 per cent. would be three farthings and one-fifth of a farthing, even if he is entitled to receive 1*d.* for a single month, on account of the necessity of the case, he is not therefore, on a loan for a longer period, entitled to treat the contract as a monthly contract, and to receive at the rate of 1*d.* a month for such period, when there would be no longer any difficulty in paying him at the exact rate of 20 per cent. *The Queen v. Goodburn.* 468

### PAYMENT INTO COURT.

1. Payment into Court generally, to

a declaration in covenant, setting out several covenants and assigning a general breach, admits some damage upon every part of the breach, and therefore judgment cannot be arrested, although the breach, with reference to some particular covenant, would be bad on demurrer.

Thus, where a covenant to repair and to leave in repair made an exception of reasonable wear and tear, and the breach contained no such exception, and another covenant was to repair after a month's notice in writing, but the declaration did not state that such notice was given in writing:—Held, that these defects were waived by payment generally, on a breach stating that defendant did not, within a month after notice, or at any other time, repair or leave in repair. *Wright v. Goddard.* 361

### PLEADING.

See *PRESCRIPTION*—*RIVER*—*SHERIFF*.

#### I. *Form of Action.*

1. Assumpsit is maintainable by a trading corporation on an executory contract for the supply of goods, for the manufacturing and supply of which the company was incorporated.

A contract, by an incorporated gas company, to supply gas at 12*l.* 16*s.* a year, is a contract of such frequent and daily occurrence that it may be made by parol.

Where a corporation declare in assumpsit in the name by which they are incorporated by act of parliament, the Court are bound, even after verdict in their favour, to notice that they are a corporation. *Church v. Imperial Gas Light Company.* 35

2. Where two horses were sold for

80*l.*, and the money paid, on condition that the purchaser might return them within a month, allowing 10*l.* off the above sum, and that he should pay 10*l.* extra if he kept them:—Held, that the purchaser, having so returned them, might maintain money had and received for the 70*l.*, as the seller was to be considered a stakeholder for the party entitled at the end of the month. *Hurst v. Orbell.* 237

## II. Declaration.

### See post, IV. V.

1. Where there is a general covenant to repair and leave in repair, and another covenant to repair on a month's notice, if the declaration assign a breach on each of these covenants, it is open to a special demurrer if the damages from each are not separately stated. *Wright v. Goddard.* 361
2. *Quære*, whether, after setting out the whole of a contract, and averring mutual promises, it is necessary to state any additional implied promise, according to the legal effects of the whole contract? *Whitwill v. Scheer.* 398
3. When the declaration in replevin does not sufficiently specify the goods and chattels, and the place in which they are taken, the defect is cured by an avowry justifying the taking of the said goods and chattels in the said place, even though the avowry be a bad plea. *Banks v. Angel.* 94

## III. Plea.

### 1. What must be pleaded specially.

1. In assumpsit for work and labour by the plaintiffs, as solicitors on a joint retainer, an objection that one of them was not admitted of the Court in which the business was done, must be pleaded specially.

*Quære*, whether, if so pleaded, the objection is valid? *Hill and Randall v. Sydney.* 161

### 2. Several Pleas, when allowed.

1. In replevin, an avowry justifying the taking cattle damage feasant in the locus in quo, as the soil of *A.*, and a like avowry as to the soil of *B.*, are allowed under the New Rules, H. T. 4 *Will.* 4. *Evans v. Davies.* 464

### 3. Pleas in particular Actions.

1. To an action of trespass *quare clausum fregit*, and for chasing the plaintiff's sheep elsewhere than in the said closes, and detaining them for a long space of time, the defendant pleaded, as to the chasing the sheep elsewhere and detaining them, that at the times when &c., he was in the lawful possession of a certain messuage &c., and prescribed for himself and the occupiers thereof for thirty years next before the several times when &c., to have common of pasture in the locus in quo, and then justified distraining the sheep damage feasant:—Held, that whether or not a defendant at common law could justify a trespass to personal chattels, by virtue of possession generally of the locus in quo, this plea was framed on the 2 & 3 *Will.* 4, c. 71, and was bad on special demurrer, for not alleging the user to have been for thirty years next before the commencement of the action.

*Semble*, per *Patteson J.*, that it is not necessary, in a plea under the 2 & 3 *Will.* 4, c. 71, to allege the user to have been "without interruption." *Richards v. Fry.* 67

2. To debt for rent due under a demise, the defendant pleaded that before the rent became due it was agreed between the plaintiff and defendant, that in consideration of his giving up possession he should

be discharged from any further rent, and that he had given up possession accordingly, concluding with an allegation that the tenancy was thereby surrendered:—Held, that the plea was not to be taken as setting up a surrender, so as to require a memorandum in writing, but that it afforded a valid excuse for non-payment of the rent, by shewing the agreement and the giving up of possession. *Gore v. Wright.* 243

3. In an avowry on the 21 *Hen.* 8, c. 19, the defendant must allege in the avowry that the defendant is seised of the lands in which &c.

In an avowry on the 11 *Geo.* 2, c. 19, the defendant must shew a privity existing between himself and the tenant on the land, and it is not sufficient to state that certain persons unknown are tenants to the defendant, under a demise by one *J. A.* to *W. W.*, the unexpired term of which had vested in these persons unknown.

Where the defendant avowed that certain persons, to the defendant unknown, held the close in which &c. as tenants to the defendant, under a demise from one *J. A.* to *W. W.*, for a term unexpired, and that the interest of *W. W.* in the term had come to the said persons unknown, and that the rent was in arrear to the said defendant:—Held, that the avowry was not good under either of the above statutes or both of them taken together. *Banks v. Angell.* 94

4. A plea, that since the commencement of the action to recover a sum of money the defendant had paid, and the plaintiff had received, the same in satisfaction of the defendant's promise, and of all damages, without the like allegation as to costs also, is a good plea against the further maintenance of the action. *Corbett v. Swinburne.* 551

#### IV. *Departure.*

*Assumpsit* for goods sold. Plea, coverture. Replication, that at the time when the debt was contracted, the defendant was living apart from her husband, in a state of adultery; that the plaintiff, without knowledge of these circumstances, dealt with her as a feme sole, and that after her husband's death, in consideration of the premises, she promised:—Held, to be a departure from the declaration. *Meyer v. Haworth.* 462

#### V. *Demurrer.*

On a demurrer to a whole declaration, containing several counts, if one count is good, the plaintiff is entitled to judgment generally.

*Quære*, per Lord *Denman* C. J., whether a count on an account stated is demurrable for not averring the time when it was stated? *Webb v. Baker.* 87

#### VI. *Issue in particular cases.*

1. On an issue on a clause in a charter-party, that the plaintiff on a certain day had been ready to unload a vessel, and had received pratique, the plaintiff proved that the port of unloading was on the coast of Africa, where no custom-house or institution for giving pratique existed; that he was ready to unload the vessel on that day, and that no impediment to unloading existed: the jury found that the vessel was ready to unload on the day, but had not received pratique:—Held, that on this issue the plaintiff was entitled to the verdict, for pratique in this charter-party meant unloading the vessel in accordance with the laws or customs of the country. *Balley v. De Arroyave.* 114
2. Where the plaintiff alleged that the defendants impounded his cat-

tle, and that the pound was then too small to hold the cattle in a fit and proper manner, and was then wet and dirty, and wholly unfit for impounding the same, whereby a special damage accrued; and the defendants traversed that the pound was too small or that it was wet, &c. modo et formâ, omitting the word "then:"—Held, that the issue raised was not as to the general size and state of the pound, but as to its condition at the time of impounding. *Wilder v. Speer and others*, 536

3. In trespass for breaking and entering a dwelling, and seizing and taking away divers goods and chattels there being, the defendant pleaded that the house was not the plaintiff's, nor the goods his goods: at the trial the contest was, as to the right to the goods; the jury found that the house and part of the goods belonged to the plaintiff; and the plaintiff having entered the postea for himself, the Court ruled that the issue as to the goods was divisible, and ordered the postea to be amended by entering it for the defendant, as to those goods which were found not to be the property of the plaintiff. *Routledge v. Abbott*, 560

4. Trespass for throwing down a wall. Pleas,—1st, that the wall was not the wall of the plaintiff; 2nd, that the wall was a party-wall, standing partly on land of the plaintiff, partly on land of the defendant. The contest at the trial was to whom the wall belonged. The jury found that it was a party-wall:—Held, that upon this finding the defendant was entitled to the verdict on the first issue, as the plaintiff on that plea was bound to prove that the whole wall was his.

*Seemle*, that the plea of the wall being a party-wall is no answer to the trespass to the whole wall. *Murley v. M'Durmott*, 356

## POLL.

See VESTRY.

## POOR.

### I. *Poor Law Commissioners, Power of to make Unions.*

1. The parish of St. G. was created under the 10 *Anne*, c. 11, a parish for ecclesiastical purposes only, but for the relief of the poor and other parochial purposes it continued to form part of the parish of St. A., from which it had been severed. In various local acts respecting those parishes they were spoken of as united parishes, and at the passing of the Poor Law Amendment Act, the laws for the administration of relief to the poor were vested in a board of fifty guardians elected from the two parishes jointly; but neither of these parishes had ever maintained their poor separately:—Held, that these parishes were not a union incorporated for the relief of the poor under any local act, and therefore that the Poor Law Commissioners might join them to a union under sect. 26 of the Poor Law Amendment Act, without the consent of two-thirds of the existing guardians, as required in certain cases by sect. 32. *The Queen v. The Poor Law Commissioners*.—*In the matter of the Holborn Union*, 77

### II. *Township, when it may separately maintain its own Poor.*

1. The parish of St. Andrew, Pershore, contains six districts, five of them having always been, as far back as can be traced, distinct chapelries, and separately maintaining their poor, and entirely unconnected, both with each other and the rest of the parish, for all parochial purposes. The sixth district is divided into St. Andrew, Pershore, and Pensham, contain-

ing together about 1300 acres, and a population of about 1000, the river Avon running between them. Pensham has a constable, and collects its own church, highway, county, and constable rates. It has no church, but its inhabitants attend the mother church of St. Andrew, Pershore, in common with the inhabitants of the latter place. St. Andrew has two overseers, and supplies the vicar's churchwarden; the other churchwarden is elected by the rate-payers of both districts out of the inhabitants of Pensham. Pensham has also one overseer. The poor rates for the two districts are separately made and collected, but when collected constitute a common fund, which is applied indiscriminately to the relief of their common poor, who are also maintained together at their common workhouse in the St. Andrew district.—Held, that Pensham was not a separate district for the maintenance of the poor, that it was not necessary to treat it as such in order to give it the benefit of the 43 Eliz. c. 2, and that, therefore, an appointment of two separate overseers for it was bad. *The Queen v. The Justices of Worcestershire.* 434

### III. Poor-rate. *What rateable.*

1. Where the mains and pipes of a Gas Company are distributed through several parishes, the proper criterion for the assessment of the Company to each parish, is not the amount of receipts for gas supplied therein, but a proportionable part of the rent at which, after deduction for the wear and tear of machinery, the works of the Company would let, calculated according to the improved value of land, from the apparatus and works of the Company laid down therein.

The proper deduction to be

made from the rent of a Company's works, to form the basis of a poor-rate assessment, is such an annual sum as will be sufficient to replace the works when worn out.

An assessment upon the above principles is not levied in any degree on the profits of the Company.

A Gas Company in the town of Cambridge, which consists of several parishes, in which are situated numerous colleges which are extra-parochial, supplied gas in mains and pipes to the colleges, and was rated therefore to the parishes in which the colleges are locally situated:—Held, that the rate was bad, the Company being rateable in respect not of its receipts, but the land occupied. *The Queen v. Cambridge Gas Light Company.* 262

#### *Who rateable.*

2. On an appeal against a poor-rate it appeared that the appellant was the servant and head brewer of R. & Co., and that by an agreement between them and him, they were to give him a certain salary and a house belonging to them, to occupy free of rent and taxes, and he was to take in another servant of R. & Co. if required. The appellant occupied the house for some time, and on leaving it he took another house not belonging to them, which he occupied. R. & Co. were no parties to the taking of this house, but they paid the rent and rates. The appellant was assessed regularly in his own name for the window duty, and also for the poor's rate; he had objected to being assessed to the poor's rate, but the two last rates previous to the one appealed against had been paid without objection. The appellant had also paid the registration shilling under the Reform Act, and had voted as the occupier with a 10*l.* qualification:

—Held, that the appellant was properly rated, as his occupation was in no ways subordinate to his service, and the payment of rent by *R. & Co.* was an immaterial circumstance. *The Queen v. Wall Lynn.* 411

#### IV. Settlement.

##### *By renting a Tenement.*

1. A settlement is gained by a pauper who has occupied a tenement for a year, and paid 10*l.* rent in respect of it, although the sum of 6*s.* for tithes has been paid by his landlord. *The Queen v. St. John's, Bedwardine.* 302

##### *By Apprenticeship.*

2. A minor, by indenture of apprenticeship, put himself apprentice to his father to learn the trade of a tailor. The indenture first bore date the 12th December, 1813, but the parties, for the fraudulent purpose of enabling the minor to exercise the trade of a tailor, and have full benefit of the 5 *Eliz.* c. 4, (then in force,) after five years' apprenticeship, caused the indenture, before execution, to be antedated two years. On an appeal touching the validity of this indenture, held, that as it was fraudulently intended to contravene 5 *Eliz.* c. 4, s. 31, it was altogether void, although the appellant parish was no party to the fraud. *The Queen v. Inhabitants of Barmston.* 167

#### V. Order of Removal.

And see post, VI. 1.

##### *Effect of, when confirmed on Appeal.*

1. By an order of two justices, confirmed on appeal, *D. S.* and *E.* his wife, with their six children (named therein) were removed to the parish of *W.* A subsequent order was obtained for the removal of

*W. S.* to the parish of *W.*, who was born during the marriage of *D. S.* and *E.*, and unemancipated at the date of the first order, but was not named in it:—Held, that though the first order of removal, confirmed on appeal, was conclusive as to all the facts stated in it, it was competent to the parish of *W.*, on appeal against the subsequent order, to shew a new state of facts, by proving that, since the date of the first order of sessions, the marriage between the father and mother of *W. S.* had been dissolved by the Ecclesiastical Court, as void ab initio, so as to defeat his derivative settlement in the appellant parish. *The Queen v. Inhabitants of Wye.* 6

#### VI. Practice under Poor Law Amendment Act.

1. An order of removal is bad, unless the removing parish serve a notice of chargeability, together with a copy of the order of removal, on the other parish. *The Queen v. Inhabitants of Brisham.* 408
2. Under the 4 & 5 *Will.* 4, c. 76, s. 81, requiring the parish appealing against an order of removal, to deliver to the overseers of the respondent parish a written statement of the grounds of appeal, fourteen days at least before the first day of sessions, the fourteen days must be clear days exclusively of the day of the delivery, and of the first day of sessions. *The Queen v. Justices of Salop.* 286
3. A statement of the grounds of appeal against an order of removal was duly served before the Epiphany sessions, when the appeal was intended to be tried, but in consequence of pressure of business was made a remanet. A fresh statement, differing in some respects from the former, was after-

wards served, and relied upon at the next sessions :—Held, that the sessions were bound to hear the appeal. *The Queen v. Justices of Derbyshire.* 591

4. Chargeability, notice of, *ante*, 1.

VII. *Removeability of Poor.*

A bastard child, born before the passing of the 4 & 5 *Will.* 4, c. 76, living apart from her mother, who had married, and whose husband was alive, is removeable to the parish of her birth, although within the age of nurture. *The Queen v. Inhabitants of Wendron.* 62

POSTEA (AMENDMENT OF).

See PLEADING, VI. 3.

PRACTICE.

See AFFIDAVIT.—ATTORNEY, 2.—CERTIORARI, 2.—COSTS—MANDAMUS.

1. A defendant had notice to admit certain documents, one of which was described as the counterpart of a lease, and an order to admit was thereupon made. At the trial the instrument produced was signed by both parties, and appeared to be a lease, but it only bore a counterpart stamp:—Held, that the defendant was precluded by his admission from taking the objection, as he had an opportunity of inspecting the document before he had made the admission, and ought to have made the objection then.

This Court will not allow a party, as a matter of right, to shew cause against a rule in the first instance, although notice has been given to the other side. *Doe v. Smith.* 335

2. Where an affidavit, upon which a rule nisi for a criminal information has been obtained for a libel, omits

to shew publication, the prosecutor cannot afterwards, when cause is shewn against the rule, avail himself of affidavits on the other side, in which the publication is admitted. *The Queen v. Baldwin.* 342

3. Where a writ de contumace capiendo set out the sentence of the Spiritual Court, which, among other matters, directed certain costs to be paid by the defendant, the Court of Queen's Bench refused to quash the writ for an alleged invalidity in the sentence, as to the other matters, that part of it being good which awarded costs against the defendant, who was therefore in contempt for the non-payment of them. *Kington v. Hack.* 3

4. Where the trial is in term, and the defendant surrenders himself in discharge of his bail in a subsequent vacation, the surrender relates back to the preceding term.

The affidavit of notice of render required to be made by Reg. Trin. 1 *Anne*, may be made at any time before the defendant is charged in execution. *Thorn v. Leslie.* 305

5. Application by a prisoner, taken on an attachment the 3d of February, made to the Court on the 10th day of Easter term, to be discharged out of custody, for irregularity, the affidavit of irregularity having been made on the 20th of February, is too late. *The Queen v. Burgess.* 366

PRESCRIPTION.

See PLEADING, III. 3.

1. The plaintiff prescribed under 2 & 3 *Will.* 4, c. 71, first, for a right of pasture thirty years before the commencement of the action; and, secondly, for a right of simply turning on cattle for twenty years. Evidence was given of acts of depasturing at a period commencing

more than thirty years before the commencement of the suit, but that more than twenty-eight years before the suit, (in 1809,) a rail was erected so as to interrupt the enjoyment of pasture, and that afterwards, the rail having been removed, the plaintiff depastured for twenty-eight years.—Held, that the defendant was not bound to prove that the rail was erected adversely to the plaintiff's right, but that the onus lay on the plaintiff to prove affirmatively his actual enjoyment of pasture for thirty years, and that no presumption could be admitted in his favour, on proof of enjoyment for a less period.

That proof of his enjoyment of pasture for twenty-eight years did not include proof of the right of turning on for twenty years, the latter right being an easement only, a right of quite a different nature, and of which no evidence was given.

Per *Littledale J.* A plea claiming for twenty years next before the commencement of the suit, a right for the occupiers of &c., every year, and at all times of the year, to turn in cattle upon the locus in quo, without saying for what purpose, is demurrable. *Bailey v. Apple-yard.* 257

2. Where cattle have escaped from an adjoining close into that of defendant's, through defect of fences which he is bound to repair, he is not justified in driving them out into the highway and leaving them there, although it may be their best way back.

*Quære*, would he be justified if he had not left them there, but had conducted them back to the close from which they had escaped? *Carruthers v. Hollis.* 246

#### PROHIBITION.

1. The defendant had been libelled

in the Ecclesiastical Court for non-payment of a church-rate: he alleged in his answer that the rate was retrospective: the plaintiff answered, that the rate was in part retrospective, but alleged that it was applied to the payment of accounts for the current year: the judge of the Ecclesiastical Court rejected the plaintiff's answer. The plaintiff appealed to the Court of Arches, who reversed the decision; the defendant then appealed to the Privy Council, and before any proceedings were taken, applied to this Court for a prohibition:—Held, that there was no ground for prohibition, as the Court would intend that the Privy Council would decide the appeal properly. *The Queen v. Judicial Committee of the Privy Council.* 15.

2. Where the plaintiff declared in prohibition that he had been libelled by the defendant in a Spiritual Court, for non-payment of a church-rate, and that he had excepted to the libel on different grounds, one of which was as to the construction of an act of parliament, and averred that the said exceptions were not the subject of ecclesiastical recognizance, and thereupon prayed for a writ of prohibition:—Held, that he had shewn no ground for prohibition, as it did not appear that the Court below were proceeding to decide on the act of parliament, or that it would decide contrary to the common law. *Hall v. Maule and others.* 459

#### QUARTER SESSIONS.

See CERTIORARI, 1.

#### QUO WARRANTO.

1. Where a franchise has been exercised for many centuries, been recognised by ancient statutes, and it is probable, from all the circum-

stances of the case, both that such a franchise should have been granted, and that, if usurped, it would have been repeatedly questioned, which did not appear to be the fact, the Court will not grant a rule for a quo warranto to try its validity, merely because it cannot be distinctly traced to any legal origin. Under these circumstances, the Court refused a rule to the Vice-Chancellor of Cambridge to inquire into his title to license alehouses within the liberties of the University.

*Quære*, would quo warranto lie for such a franchise? *The Queen v. Archdall*.

2. Quo warranto information does not lie against the freeman of a borough who does not appear to possess any corporate property, and who had been struck off the roll of electors for members of parliament by the revising barrister. *The Queen v. Pepper*. 155
3. Where a councillor's name has been expunged from the burgess roll, quo warranto is the proper mode to try his title to the office, and not mandamus to the mayor to hold a fresh election. *The Queen v. Ricketts*. 151

#### RATE.

See POOR, III.—CHURCH—PROHIBITION.

#### RATED INHABITANT.

*When a competent Witness.*

See EVIDENCE, II. 2.

#### RECOVERY.

See ESTATE.

#### REGULÆ GENERALES.

1, 2, 379

#### REPEALED STATUTE,

*Effect of.*

See HIGHWAY, 1.—STATUTE, 1.

#### RIVER.

The right of the public to navigate a public river is paramount to any right of property in the crown, which therefore never had the power to grant a weir so as to obstruct the public navigation; and if a weir, which was legally granted in such a river, caused obstruction at any subsequent time, it became a nuisance.

Weirs erected in public rivers before the time of *Edward 1*, although an obstruction to navigation, are legalized by subsequent acts of the legislature.

In trespass for destroying a weir in the plaintiff's fishery,—plea of justification that the weir was across part of a public navigable river, and obstructing the navigation of the same; a replication, confessing that the locus in quo was part of a navigable stream, but alleging that the locus in quo was a part of the river wholly distinct from the channel which the public had navigated, was held good after verdict, and that the plaintiff might shew that under it the navigation in the locus in quo was lawfully obstructed. *Williams v. Wilcox*. 606

#### RULES.

See NEW RULES.

#### SHERIFF.

A sheriff cannot recover on an indemnity bond which has been procured by the fraud of his own officer.

A plea to an action on such a bond, that it was obtained by the

sheriff and others in collusion with him by fraud and covin, is a good plea. *Raphael v. Goodman.* 547

SIGNATURE.—See DEVISE, 1.

### STAGE.

The legal meaning of the word "stage-waggon" is a conveyance that carries goods or passengers, for hire, from one fixed point to another.

Thus, where a local turnpike act imposed a certain toll on every horse, &c. drawing a carriage of any description, but contained an exception for every person who had paid toll on any carriage, &c. once in the day; and the act contained a further proviso that every stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage, conveying passengers or goods for pay or reward, should pay toll every time of passing and re-passing,—it was held, that the waggons of a wharfinger, carrying out the goods, brought by a canal, to the different consignees, and collecting the goods from persons in the neighbourhood, to carry to his wharf, were not "stage-waggons" within the meaning of the act. *The Queen v. Ruscoe.* 428

### STAMP.

See EVIDENCE.

1. An instrument operating as a further security for a sum on which the ad valorem duty has been paid, and also as a security for an additional sum advanced, is not exempted from any other duty with regard to its operation as a further security under 55 Geo. 3, c. 184, Sched. tit. "Mortgage," than the ad valorem duty. *Lant v. Peace.* 329
2. A mortgage deed, to secure 300l.

and interest, with a proviso for redemption if the mortgagor should repay the sum due, and should pay all rates and taxes which might be imposed on the premises, and containing a covenant also to the same effect, is properly stamped with an ad valorem stamp, under 55 Geo. 3, c. 184, and does not require the 25l. stamp payable on deeds securing a sum of indefinite amount. *Doe d. Mercer v. Bragg.* 644

3. Where judgment by default passed against a defendant in ejectment, who was the tenant in possession, and a writ of possession issued out; an instrument signed by him, reciting that possession had not been taken under the judgment at his request, and that the lessor of the plaintiff had devised the premises to A. B., and witnessing that he, the defendant, then attorned tenant to the said A. B., does not require a stamp. *Doe v. Smith.* 335

### STATUTE.

#### I. Repealed Act in force, for what purposes.

Where an act of parliament directs a mode of procedure to be adopted, as contained in a former act, the repeal of the former act does not operate to repeal the procedure directed, which is to be considered as incorporated in the latter act. *The Queen v. Stock.* 420

See HIGHWAY, 1.

#### II. Language of, when construed to be imperative.

See ACTION ON THE CASE.

#### III. Decisions on particular Statutes.

25 Edw. 3, st. 4, c. 4 (As to Legality of Weirs).

See RIVER.

- 21 *Hen.* 8, c. 19 (Avowry).  
See PLEADING, III. 2.
- 5 *Eliz.* c. 4, s. 31 (Fraudulent Indentures of Apprenticeship).  
See POOR, IV. 2.
- 13 *Eliz.* c. 20 (Charge on Benefice).  
See CLERGYMAN.
- 43 *Eliz.* c. 2 (When separate Overseers may be appointed for Township).  
See POOR, II.
- 43 *Eliz.* s. 9 (Costs).  
See COSTS.
- 22 & 23 *Car.* 2, c. 9 (Costs).  
See COSTS.
- 28 & 29 *Car.* 2.  
See DEVISE—FRAUDS, STATUTE OF.
- 4 *Anne*, c. 16 (Costs of double Pleading).  
See PLEADING, II.
- 4 *Geo.* 2, c. 28 (Double value).  
See LANDLORD AND TENANT.
- 11 *Geo.* 2, c. 19 (Avowry).  
See PLEADING, III.
- 25 *Geo.* 2, c. 36.  
See THEATRES.
- 13 *Geo.* 3, c. 78, s. 24.  
See HIGHWAY.
- 28 *Geo.* 3, c. 30.  
See THEATRES.
- 33 *Geo.* 3, c. 54.  
See FRIENDLY SOCIETY.
- 39 & 40 *Geo.* 3, c. 99.  
See PAWNBROKER.
- 43 *Geo.* 3, c. 46.  
See COSTS.
- 54 *Geo.* 3, c. 170, s. 9 (As to rated Inhabitant, when a competent Witness).  
See EVIDENCE, II. 2.
- 55 *Geo.* 3, c. 68 (Stopping up Paths by Church Commissioners—Appeal).  
See CHURCH.
- 55 *Geo.* 3, c. 184.  
See STAMP.
- 59 *Geo.* 3, c. 134, s. 39 (Stopping up Paths by Church Commissioners—Appeal).  
See CHURCH.
- 1 *Geo.* 4, c. 119.  
See INSOLVENT.
- 6 *Geo.* 4, c. 16, s. 75 (Liability for Rent of Bankrupt Tenant; and s. 127, as to his Estate vesting in Assignees).  
See BANKRUPT, 1, 3.
- 7 *Geo.* 4, c. 57.  
See INSOLVENT.
- 7 *Geo.* 4, c. 64, s. 23 (Costs of Prosecution).  
See CRIMINAL LAW.
- 7 & 8 *Geo.* 4, c. 75 (Waterman's Act).  
See WATERMAN.
- 9 *Geo.* 4, c. 17, s. 2 (Declaration on Admission to Municipal Office).  
See CORPORATION.
- 10 *Geo.* 4, c. 28.  
See THEATRES.
- 11 *Geo.* 4 & 1 *Will.* 4, c. 38, s. 7.  
See INSOLVENT.
- 11 *Geo.* 4 & 1 *Will.* 4, c. 64.  
See BEER.
- 1 *Will.* 4, c. 21 (Mandamus, Costs of).  
See MANDAMUS.
- 2 & 3 *Will.* 4, c. 71 (Prescription).  
See PLEADING, III. 3.
- 4 & 5 *Will.* 4, c. 76.  
See POOR.
- 5 & 6 *Will.* 4, c. 50, s. 1 (Not retrospective).  
See HIGHWAY.
- 5 & 6 *Will.* 4, c. 63 (Appointment of Inspectors of Weights and Measures).  
See CORPORATION, 13.
- 5 & 6 *Will.* 4, c. 76 (Municipal Corporation Act).  
See CORPORATION.

1 *Vict.* c. 78 (Irregularities in Municipal Election cured by).

See CORPORATION, 3.

### SURRENDER.

See PLEADING, III. 3.

### THEATRES.

Neither letters-patent from the crown, nor a licence from the Lord Chamberlain, can be granted for any dramatic performances within 10 *Geo.* 4, c. 28, except in Westminster, or some place where her Majesty may be residing; and a sessions licence under 28 *Geo.* 3, c. 30, which is the only other authority for such performance, cannot be granted for them, unless at a place not within twenty miles of London and Westminster. Dramatic performances, therefore, within twenty miles of London or Westminster, and not in Westminster or in the place of her Majesty's residence, cannot be rendered legal by any authority whatever, for the 25 *Geo.* 2, c. 36, extends only to music and dancing. *Levy v. Yates.* 249

### TIME (COMPUTATION OF.)

See ATTORNEY, I.—BEER—POOR, VI. 2.

### TOLL.

See BRIDGE, I.—EVIDENCE, IV. 3.

### TREASURY (LORDS OF).

Their jurisdiction in compensation cases under the Municipal Amendment Act.

See CORPORATION, 2.

### TRESPASS. See ORDER, 2.

1. Where a sheriff was lawfully in a room occupied by an under-tenant

of the plaintiff in his dwelling-house, and had entered the residue of the dwelling through an open door communicating between the two tenements, in order to seize the plaintiff's goods under a *fi. fa.*, and having seized the goods, was unable to carry them away without himself opening the outer door, which was locked, neither the plaintiff, nor any one on his behalf, being present whom the sheriff could request to open the door:—Held, that he was justified in breaking the outer door and the lock thereof, in order to carry away the goods.

In pleading the above facts as a justification in trespass, it is not necessary for the defendant to aver that the trespass did not happen through his own default; as such a fact should be replied affirmatively by the plaintiff. *Pugh v. Griffiths.* 187

2. Where a writ of *capias ad respondendum* has been set aside for irregularity, the attorney who sued it out is liable in trespass. *Codrington v. Lloyd.* 442

### VARIANCE. See AMENDMENT.

### VESTRY.

1. If a poll be demanded at an election for churchwardens, under Sturges Bourne's Act (58 *Geo.* 3, c. 69), every rated inhabitant, whether previously present at the vestry or not, has a right to come in and vote, and the closing of the vestry doors during the poll, so as to exclude voters, is illegal.

But where the doors were so closed, during an election of churchwardens, but it did not distinctly appear that any rated inhabitant was excluded from voting, the Court refused to grant a *mandamus* for a fresh election. *The*

*Queen v. The Rector, &c. of St. Mary, Lambeth.* 416

2. Where a committee had been appointed by a vestry in March, to consider a plan then produced, and to report whether it would be expedient to adopt that or any other plan for affording additional accommodation to the parishioners at the parish church, the following was held to be sufficient notice under the Church Building Acts (58 Geo. 3, c. 45, and 59 Geo. 3, c. 154), and the Vestry Act (58 Geo. 3, c. 69), that the object of a subsequent meeting was to authorize the borrowing of money:—"24th July, 1830. Notice is hereby given, that a vestry will be held in the vestry-room of this parish on Monday, the 2d of August, at nine o'clock, &c., to receive a report from the church committee, and to adopt such measures as may appear necessary for carrying the report into execution."

*Quære*, would the notice have been sufficient, if the latter part of it ("and to adopt such measures, &c.") had been omitted? *Semble*, per *Patteson J.* that it would. Per Lord *Denman C. J.*, and *Littledale J.*, that it would not.

*Quære*, also, where a church rate has been made for the repayment of money borrowed under certain acts, and a parishioner,

who refuses to pay the rate, on the ground that sufficient notice of borrowing the money was not given to the parish under those acts, has been libelled in the Arches Court, has this Court jurisdiction to prohibit the Court below, after the libel has been admitted to proof, but before sentence? *Blunt v. Harwood.* 577

## VOLUNTARY CONVEYANCE.

See ESTATE—INSOLVENT, 3.

## USE.

See ESTATE.

## WATERMEN.

Under section 57 of the Waterman's Act (7 & 8 Geo. 4, c. 75), the Court of Mayor and Aldermen are enabled to make bye-laws for the regulation of "boats, vessels, and other craft to be rowed or worked within the limits of the act:"—Held, that these words include steam-boats. *Tisdell v. Combe.* 29

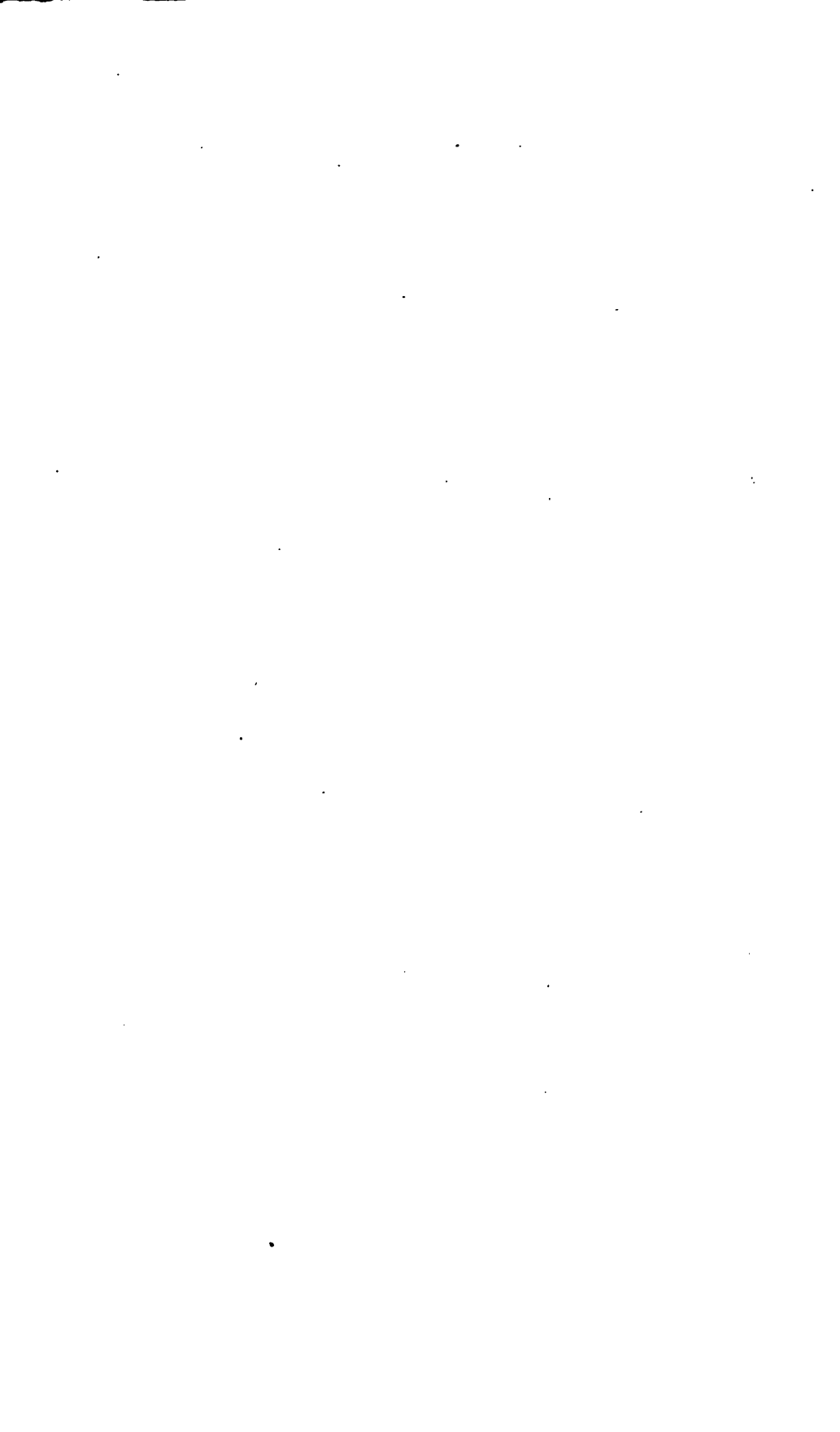
## WEIGHTS AND MEASURES.

Appointment of inspectors of.  
See CORPORATION.

WRIT. See TRESPASS, 2.

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